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No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,
Appellants,

and

RICHARD M. DALEY, et al., and
NEIL F. HARTIGAN,
Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,
Appellees,

and

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the State of Illinois may require physicians who prescribe or administer abortifacients to inform their patients that they have done so, when the physician is given broad discretion in determining the manner in which that information is conveyed to the patient?

2. Whether a justiciable case or controversy was present in a facial challenge to Sections 6(1) and 6(4) of the Illinois Abortion Law, when the relevant statutory provisions had been amended and substantially altered?

3. Whether the Court of Appeals, if it did not err in addressing old §6(1), in light of the State's compelling interest in post-viable fetal life, nevertheless erred, in disregarding basic rules of statutory construction to strike

down a statute, capable of constitutional construction, that established a standard of care applicable to fetuses known to be viable?

4. Whether the State of Illinois can protect its strong interest in fetal life by requiring that the method of abortion be used that is most likely to preserve the life of the fetus, at that time in pregnancy when the fetus has a reasonable possibility of survival?

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Appellees.

On Appeal from the United States Court
of Apeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

Appellants, Eugene F. Diamond, M.D., and Jasper F. Williams, M.D., together

with Appellant Neil F. Hartigan, Attorney General of the State of Illinois, appeal from the final judgment of the United States Court of Appeals for the Seventh Circuit, dated November 30, 1984, holding that Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law unconstitutionally infringed upon a woman's fundamental right of priavacy as secured by the Fourteenth Amendment of the Constitution.*

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* In addition to the parties named in the caption, the following were also parties to the proceedings in the court below: Marvin Rosner, M.D., David Zbaraz, M.D., Martin Motew, M.D., Hector N. Zevallos, M.D., National Health Care Services of Peoria, Inc., Arthur C. Watson, M.D., and Robert C. Steptoe, M.D. All of these parties are appellees in this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit permanently enjoining Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law, which appears in the appendix attached hereto, App. 1-49, is reported at 749 F.2d 452 (7th Cir. 1984).

The opinion of the District Court for the Northern District of Illinois permanently enjoining sections 2(10), 6(4) and 11(d) of the Illinois Abortion Law is reported at 579 F.Supp. 464 (N.D. Ill. 1983).

The opinion of the District Court for the Northern District of Illinois issuing a preliminary injunction against certain sections of the Illinois Abortion Law on renewed motion for preliminary injunction is reported at 579 F.Supp. 377 (N.D. Ill. 1983).

The opinion of the Court of Appeals for the Seventh Circuit granting a preliminary injunction against certain sections of the Illinois Abortion Law, is reported at 627 F.2d 772 (7th Cir. 1980).

The opinion of the District Court for the Northern District of Illinois, issuing a preliminary injunction against certain sections of the Illinois Abortion Law, is not reported.

JURISDICTION

The final judgment of the Court of Appeals for the Seventh Circuit holding Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law unconstitutional as violative of the Fourteenth Amendment of the Constitution was entered on November 30, 1984. Suit was brought pursuant to 42 U.S.C. §1983.

Notice of appeal to this Court was duly filed in the Court of Appeals for

the Seventh Circuit on February 28, 1985.

This appeal is being docketed within 90 days of the entry of final judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend XIV, §1

Ill. Rev. Stat. Ch. 38, ¶81-22(10) (1983)

Ill. Rev. Stat. Ch. 38, ¶81-26(1) (1983)

Ill. Rev. Stat. Ch. 38, ¶81-26(1) (1984 Supp.)

Ill. Rev. Stat. Ch. 38, ¶81-26(4) (1983)

Ill. Rev. Stat. Ch. 38, ¶81-26(4) (1984 Supp.)

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Ill. Rev. Stat. ch. 38, ¶81-22(9) (1983)

Ill. Rev. Stat. ch. 38, ¶81-22(6) (1984 Supp.)

Ill. Rev. Stat. ch. 38, ¶81-26(5) (1983)

The text of these provisions is set forth in the appendix to this jurisdictional statement.

STATEMENT OF THE CASE

(1) On October 30, 1979, the Illinois General Assembly passed S.B. 47, which contained amendments to the Illinois Abortion Law of 1975. S.B. 47 became law on November 20, 1979 upon a vote by two-thirds of the legislature to override a gubernatorial veto.

(2) On October 30, 1979, the same day as the passage of S.B. 47, Appellees filed a complaint in the United States District Court for the Northern District of Illinois seeking declaratory and injunctive relief against enforcement of the law by the Attorney General and the class of State's Attorneys represented by the State's Attorney for Cook County. Appellants Drs. Eugene F. Diamond and Jasper F. Williams were among those granted leave to intervene as defendants by the District Court.

(3) Plaintiffs are physicians and corporations who perform or provide abortions.

(4) In a Memorandum Opinion of November 16, 1979, then-District Judge Flaum upheld several provisions, including §2(10)'s definition of "abortifacient" and §11(d), which requires that anyone prescribing an abortifacient inform the patient that he or she is doing so. Both are at issue in this appeal. Several other sections of the law were preliminarily enjoined by the District Court, including the standard of care provisions of §§6(1) and 6(4), which were enjoined because they incorporated the term "viability" which was held to be invalid. Both of these sections are also at issue in this appeal.

(5) Plaintiffs appealed from the

District Court's decision refusing to enjoin §§2(10) and 11(d), among others, and the Court of Appeals issued a preliminary injunction against these two sections. Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) (Charles I). Sections 6(1) and 6(4) were not appealed.

(6) Following the Seventh Circuit's decision, Plaintiffs filed a Renewed Motion for Preliminary Injunction against the remaining sections in the District Court. On July 14, 1983 District Judge Kocoras granted Plaintiffs' motion in part and denied it in part. However, none of the sections that are now on appeal was the subject of that ruling. Charles v. Carey, 579 F.Supp. 377 (N.D. Ill. 1983) (Charles II).

(7) Illinois House Bill 666, which amended the definition of "viability" in §2(2) and which substituted "sustained

survival" for the original language of "more than momentary survival" in §§6(1) and 6(4) was signed into law as Public Act 83-484 on September 17, 1983. It became effective immediately.

(8) On October 14, 1983, the District Court issued a Memorandum Opinion ruling on the parties' cross-motions for summary judgment, granting each in part. Judge Kocoras issued a permanent injunction against §§2(10), 6(4) and 11(d), but upheld §6(1) as amended by Public Act 83-484, and dissolved a preliminary injunction against it. Charles v. Carey, 579 F.Supp. 464 (N.D.Ill. 1983)(Charles III).

(9) On October 25, 1983, Intervening Defendants filed a timely motion pursuant to FRCP 59 to amend the October 14 judgment by dissolving the injunction against §6(4). In support of that

motion, Intervening Defendants filed on October 31 a Memorandum in Support of the Constitutionality of Section 6(4) of the Illinois Abortion Act of 1975 as amended by Public Act 83-484. On November 2, 1983, the District Court denied Intervening Defendants' motion in an unreported order.

(10) On December 2, 1983, Defendants Daley and Hartigan and Intervening Defendants timely filed separate motions of appeal from the final judgment, as amended on November 2, insofar as it permanently enjoined §§2(10), 6(4), and 11(d). On December 16, Plaintiffs cross-appealed from the District Court's refusal to issue a permanent injunction against §6(1). Briefs were subsequently filed in the Court of Appeals for the Seventh Circuit.

(11) On June 30, 1984, the Illinois

General Assembly enacted H.B. 1399, Public Act 83-1128, which amended the language of §§6(1) and 6(4), but not §§2(10) or 11(d). Subsequently, Intervening Defendants informed the Court of Appeals that the law had been amended to alter provisions that had been enjoined by the District Court and were then currently on appeal.

(12) Oral argument before the Seventh Circuit Court of Appeals was heard on September 19, 1984. At the close of oral argument, the Court acknowledged the amendments to §6(1) and §6(4), and directed the parties to file supplemental briefs addressing the issue of whether these amendments mooted the controversy with respect to these particular sections.

(13) On November 30, 1984, the Court of Appeals issued an opinion in

which it (a) held that the controversy concerning §6(1) and §6(4) was not moot and ruled upon the constitutionality of those sections as they stood repealed by Public Act 83-1128; (b) affirmed the District Court's permanent injunctions against §2(10), §6(4) and §11(d); (c) reversed the District Court's opinion with respect to §6(1); and (d) ordered that a permanent injunction be entered against §6(1). Charles v. Daley, 749 F.2d 452 (7th Cir. 1984) (Charles IV). Defendants and Intervening Defendants now appeal from that Decision, Final Judgment, and Order.

THE QUESTIONS ARE SUBSTANTIAL

The State of Illinois may require physicians who prescribe or administer abortifacients to inform their patients that they have done so, when the physician is given broad discretion in determining the manner in which that information is conveyed to the patient.

The State of Illinois has determined hat it is necessary to protect the right its female citizens to choose not to e abortifacients. To this end, the tate enacted §11(d) of the Illinois ortion Law.[1] That section requires hat physicians who administer or rescribe abortifacients inform their atients that they are doing this. othing in §11(d) requires the physician o describe an abortifacient in any paricular manner. He may use whatever anguage he chooses in describing

1. Section 11(d) was renumbered as 11(3) by House Bill 1399. Ill. Rev. tat. ch. 38, ¶81-31(3) (1984 Supp.)

it. Thus, the State leaves broad discretion to the physician to determine the manner in which the required information will be disclosed to his patient.

The Court of Appeals struck down §11(d),[2] stating that it unconstitutionally infringed upon a woman's right of privacy as set forth in Roe v. Wade, 410 U.S. 113 (1973). App. 39-43. This holding is in direct conflict with the decisions of this Court in Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976), and City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2502 (1983).

In Planned Parenthood v. Danforth, the Court held that it is permissible for the State to require a woman's prior,

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2. Section 2(10) defines "abortifacient" so that §11(d) is not vague and doctors will know under what circumstances §11(d) applies. This section was also struck by the Court of Appeals.

written consent to an abortion. In so doing, the Court stated:

> [I]t is desirable and imperative that [the abortion decision] be made will full knowledge of its nature and consequences. The woman is the one primarily concerned and her awareness of the decision and its signficance may be assured constitutionally by the State.

d. at 67.

Again, in Akron, this Court stated: Consistent with its interest in ensuring nformed consent, a State may require that physician make certain that his patient nderstands the physical and emotional mplications of having an abortion." kron, 103 S.Ct. at 2501. Indeed, this ourt stated that a provision that merely escribes in general terms the infor- ation to be disclosed would be per- issible because it leaves the "precise ature and amount of this disclosure o the physician's discretion and 'medical udgment.'" Id.

On its face, §11(d) requires no more than is permissible under Danforth and Akron. It describes in general terms that the doctor must inform his patient that he is prescribing an abortifacient for her if he knows that he is doing this. The precise manner in which the doctor discloses this information is left totally to his discretion.[3] Thus, he is

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3. An abortifacient is "an agent which causes an abortion;" an abortion is defined as "the premature expulsion from the uterus of the products of conception." Dorland's Medical Dictionary 4 (25th ed. 1974). Thus, an abortifacient is an agent that causes the premature expulsion of the products of conception from the uterus. Section 2(10) does not define "abortifacient" more broadly than this, and a physician is free to inform his patient that he is prescribing for her a drug or device which "causes an abortion," or which causes the "premature expulsion from the uterus of the products of conception." Nothing in §11(d) penalizes a physician for describing an abortifacient in this manner. Nor does it in any way require a physician to explain an "abortifacient" to his patient in the manner set forth in §2(10).

given the necessary flexibility that Akron requires.

The State's interest in enacting §11(d) is just as important as the State's interest was in Danforth. There are many different forms of "birth control" practiced in this country today: Some prevent conception and are "contraceptives" (e.g., spermicides, diaphragms, sterilization procedures); others prevent birth after conception has taken place and are "abortifacients" (e.g., prostaglandin suppositories and prostaglandin injections).

With increasing frequency, abortions and abortifacients are being used as methods of birth control.[4] Yet many

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4. Approximately one-third of all abortions performed each year are performed on women who have had at least one prior abortion. Centers for Disease Control, U.S. Dep't of Health and Human Services, Abortion Surveillance 1980, at 37 (Table 13) (1983).

still think of "birth control" as a method of preventing conception since this was its meaning prior to the legalization of abortion; they are not aware that both abortifacients and contraceptives are now considered methods of birth control.

A doctor who prescibes an abortifacient for a woman could truthfully tell her that he is prescribing a method of "birth control" for her. However, a woman who associates "birth control" with contraceptives would not suspect that the method of birth control prescibed was in fact an abortifacient.

Affidavits submitted in the district court by Appellants demonstrate that many women believe that from the time of fertilization the fetus should be valued and not destroyed. See Affidavits of Dianna Shark, Debra Evans, Mary Gasper, and

Delia D'Haern. App. 61-67. These women would use contraceptive methods of birth control but would never knowingly choose to use an abortifacient method of birth control because that would cause the death of an organism already in existence. Plainly, failure to inform such women that something is being administered to them that would cause an abortion would be an egregious violation of their freedom of choice.

Women have a right to choose not to have an abortion that is at least as fundamental as the right to choose abortion. Maher v. Roe, 432 U.S. 464, 472 n.7 (1977). Because of the fundamental nature of this right, the State maintains a compelling interest in its protection that fully justifies the requirements of §11(d).

In spite of the State's compelling

interest in protecting the fundamental right of its female citizens to choose between contraceptive and abortifacient methods of birth control, and the fact that §11(d) requires no more than what is permissible under Danforth and Akron, the Court of Appeals struck it down. In so doing, the court disregarded well-settled principles of statutory construction, and relied on assumptions that were not supported by fact or logic. Thus, it failed to give §11(d) principled constitutional analysis.

In striking §11(d), the court held that it unconstitutionally "force[d] the physician to act as the mouthpiece for the State's theory of life." App. 40. This Court's decision in Akron was cited as authority for the court's holding.[5]

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5. Citing Akron for the proposition that the State may not "foist[] upon the pregnant woman its view that life begins

The language of Akron on which the court relied, however, is inapposite. That statement was made in the context of an ordinance that specifically required a

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at conception," the Seventh Circuit reasoned that "sections 2(10) and 11(d) constitute such an attempt by the State of Illinois because the terms incorporate a definition of 'fetus' in which the State classifies a fetus as a human being from fertilization until death [sic]." "Fetus" was formerly defined as a human being from fertilization until birth. Ill. Rev. Stat. ch. 38, ¶81-22(9) (1983). That definition of "fetus" was amended, by House Bill 1399, prior to the court's ruling, to mean "an individual organism of the species homo sapiens from fertilization to live birth." Ill. Rev. Stat. ch. 38, ¶81-22(6) (1984 Supp.). The court was made aware of that fact but disregarded it in its ruling. Thus, under the new law, as it presently exists, the definition of fetus does not use the term "human being" or "human." While the term "human" may have additional connotations of personhood or membership in society which may be offensive to some, it is an undisputed scientific fact that a new individual of the species homo sapiens begins his or her life at fertilization. Surely the State may define the subject of its regulation [the fetus/unborn child] in a scientifically correct and philosophically neutral fashion.

doctor to tell a woman that "the unborn child is a human life from the moment of conception." Akron, 103 S.Ct. at 2488. Nothing in either §2(10), which is merely definitional, or §11(d), the regulatory provision, requires the doctor to state any such thing.

Moreover, even if an individual doctor chooses to inform his patient that he is administering a drug or device which "kills unborn children," his choice of words cannot be imputed to the State. Only when a statute directs the doctor to use specific words, as did the Akron ordinance, can the use of those words be attributed to the State.[6] Since these sections do not in any way require doc-

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6. The case at bar was brought under 42 U.S.C. §1983 alleging a violation of the right of privacy under the Fourteenth Amendment to the U.S. Constitution. The Fourteenth Amendment and §1983 only protect against state action.

tors to espouse one theory of life by informing their patients that an abortifacient "kills unborn children," or causes fetal death, the requisite "state action" is not present to support a claim under either 42 U.S.C. §1983 or the Fourteenth Amendment, See, Blum v. Yaretsky, 102 S.Ct. 2777, 2786 (1982) (constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct).

Furthermore, unlike Akron, it cannot be said that the State is attempting to influence the woman's decision by merely requiring that a woman be told when an abortifacient is being prescribed for her. It cannot be seriously claimed that it is possible for a woman to choose not to use an abortifacient when she is unaware that one is being prescribed for her.

The court also objected to §11(d) because it felt that it infringed upon the "right of private decision-making in matters relevant to contraception." App.43. It is clear from the statute that the court itself does not grasp the fundamental difference between contraceptives and abortifacients. Section 11(d) applies only when an abortifacient (not a contraceptive) is being prescribed. The only conceivable way that this section could infringe upon a woman's right to use contraceptives, would be if the State were to classify certain contraceptives as abortifacients in an attempt to dissuade women from using those contraceptives. This the State has not done. The definition of "abortifacient" in §11(d) is no broader than the medical definition contained in Dorland's Medical Dictionary. In both cases, the term

applies to drugs or devices that prevent birth after fertilization has taken place. Only those drugs which the physician knows are abortifacients and are in fact abortifacients are covered by §11(d). Therefore, it would be impossible for this section to infringe upon a woman's right to use contraceptives.

Moreover, courts are not free to ignore principles of statutory construction simply because a statute involves abortion, and the Court of Appeals seriously erred in construing §11(d) to require physicians to "notify their patients that the drug or device which they have prescibed will terminate the life of any fetus which their patients might be carrying." App.41. The court's construction was contrary to the plain

language of section 11(d),[7] contrary to the limiting construction of the agencies charged with enforcement of §11(d)[8] and it violated the principle that a statute should be construed in a manner that avoids constitutional attack.

In addition to its misapplication of Akron, the court suggests that §11(d) is unconstitutional because it is somehow inequitable to require that women wishing to use abortifacients be told that they are using them. The court fails to specify what supposed burden is imposed upon

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7. There is nothing on the face of the statute, or in the legislative history, which would support such a construction.

8. Appellants Daley and Hartigan are responsible for enforcement of these provisions. They have repeatedly stated that doctors must only inform the woman that they are administering or prescribing an abortifacient and nothing more. This is a limiting construction which the Court of Appeals was not free to ignore. Village of Hoffman Estates v. Flipside, 102 S.Ct. 1186, 1191 n.5 (1982).

these women and no such burden is set forth in the record. If a woman were not opposed to abortion, it would not be burdensome for her to be informed that a physician has prescribed an abortifacient for her. If, indeed, distress is caused to a woman from knowledge that an abortifacient has been prescribed for her, then it must be because she has reservations about abortion. Sections 2(10) and 11(d) are designed to protect the fundamental rights of women who are opposed to abortion by allowing them to choose intelligently to refrain from using abortifacients. Thus, they protect those women most likely to experience harm: those who unknowingly accept abortifacients and later learn that what they thought was a contraceptive or other medication in fact was an article violating their most deeply held beliefs.

This Court has recognized a fundamental right of women who are opposed to abortion to choose not to submit to an abortion. Maher, 432 U.S. at 472 n.7. It has also recognized the right of States to ensure that a woman's choice of whether or not to have an abortion is informed. Danforth, 428 U.S. at 67. It is axiomatic that the woman know that there is a choice to be made for her to make that choice. However, the Court of Appeals has held that the State of Illinois may not ensure that women are informed whenever an abortifacient is prescibed or administered to them.

The questions raised in this appeal are substantial. Aside from the question of whether the court erred in failing to apply general principles of statutory construction in this case, the court's decision also rested on the relative

weight to be given the rights of women who do not wish to submit to an abortion and those who do. Do these women have an equal right to choose whether or not to obtain an abortion? Or, does the Constitution require States to subordinate their interest in protecting women who do not want abortions (from unwittingly submitting to them) in order to preserve the rights of women who do want abortions but prefer to remain ignorant of the fact that the drugs they are taking will cause an abortion. The Seventh Circuit's opinion answers in the affirmative: All women must be kept ignorant of whether an abortifacient is being administered to them because some women may prefer to use them in ignorance of that fact. Thus, according to the Seventh Circuit, the Constitution prohibits States from requiring that doctors inform their

patients that certain methods of birth control are abortifacients when they are, in fact, abortifacients. Is such a callous approach toward the rights of those who do not wish to submit to abortions to be tolerated? If so, has the federal judiciary taken a new position openly favoring abortion as a policy choice in contravention of its earlier holdings and principles of federalism?

2. A justiciable case or controversy was not present in a facial challenge to Sections 6(1) and 6(4) of the Illinois Abortion Law when the relevant statutory provisions had been amended and substantially altered.

The Court of Appeals held unconstitutional two provisions of the Illinois Abortion Law regulating the standard of care to be employed by physicians in performing abortions upon fetuses of advanced gestational age. These sections are, respectively, §6(1), which applied when the fetus was known to be viable, and §6(4), which applied when it was known that there was a possibility of sustained survival of the fetus apart from the mother. The Court of Appeals ruled upon the merits of plaintiffs' facial challenge to both of these sections, which were enacted as part of S.B. 47, the 1979 amendments to the Illinois Abortion Law.

Prior to adjudication of this matter by the Court of Appeals, however, the General Assembly enacted H.B. 1399, Public Act 83-1128, the 1984 amendments to the Illinois Abortion Law.[9] In so doing, the General Assembly substantially amended and altered both §6(1) and §6(4). These amendments were directly material to this litigation because they addressed several of the alleged constitutional deficiencies present in the "old §6(1) and §6(4)." App.56-59. The old language of both sections imposed a duty of care toward the fetus that was premised upon a standard of equal protection: to employ the same skill, care and diligence to

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9. H.B. 1399 has been challenged in its entirety by several parties, including some of the plaintiffs to this action. Enforcement of its provisions has been enjoined under a temporary restraining order entered into by consent of all parties. Keith, et al. v. Daley, et al., No. 84-C-5602 (N.D. Ill.)

preserve the life and health of the fetus to be aborted as would be required to preserve the life and health of a fetus intended to be born. The duty imposed by the amended language of §6(1) and §6(4) is to use that method of abortion "most likely to preserve the life and health of the fetus." By specifying the duty owed toward the fetus in this manner, the amendments to §6(1) and §6(4) materially affect the vagueness challenge instituted against the old versions of these provisions.

In addition, amendments to both sections clarify that this duty of care applies only to physicians. Section 6(1) is also amended to replace the term "viability" with a specific deliniation of that term that is consistent with the rulings of this Court. Both of these amendments also have a material effect

upon Appellees' vagueness challenges. Finally, H.B. 1399 amended §6(4) to make it applicable only where there is a "reasonable possibility" of sustained fetal survival, as opposed to a mere "possibility." This addresses the contention that the old law could be applied whenever there is any possibility, no matter how remote, of survival.

The Court of Appeals acknowledged that these amendments "substantially transformed" §6(1), and "substantially altered" §6(4). App. 7, 9. Indeed, all of the vagueness questions raised with respect to old §6(1) were mooted by the amendments, and the vagueness questions that could have been raised against §6(4) were also addressed.[10] Yet the court

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10. A live case or controversy still remains with respect to new §6(4) concerning the State's ability to regulate on behalf of the fetus prior to viability. See this jurisdictional statement at 43-44.

failed to recognize that, due to these amendments, the old §6(1) no longer presented a live case or controversy concerning Appellees' facial constitutional attack.

A live case or controversy must exist in order to "satisfy the threshold requirement imposed by Article III." City of Los Angeles v. Lyons, 103 S.Ct. 1660, 1665 (1983). A plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury." Id., Poe v. Ullman, 367 U.S. 497, 505 (1961), and "the injury or threat of injury must be both real and substantial, not conjectural or hypothetical." Lyons, 103 S.Ct. at 1665. "[A]n actual controversy must exist at stages of appellate review . . . and not simply at the date the action is initiated." Roe v. Wade, 410 U.S. 113, 125 (1973).

Since an appellate court must "apply the law as it is now, not as it stood before," the material amendment of a statute during the pendency of a case raises the question of mootness. Schall v. Martin, 104 S.Ct. 2403, 2405 n.2 (1984).

To determine whether there is a "live controversy at the time the Court reviews the case," Sosna v. Iowa, 419 U.S. 395, 402 (1975), the case must be assessed "in light of presently existing . . . law, not the law in effect at the time that judgment was rendered." Fusari v. Steinberg, 419 U.S. 379, 387 (1957). See also, Franks v. Bowman Transp. Co., 424 U.S. 747, 755 (1976). At the time the court's "judgment was rendered," §6(1) and §6(4) had been amended by H.B. 1399, which was passed into law on June 30, 1984. The "live controversy" at that time involved the effect of the amended

sections and if the court intended to render an opinion affecting the rights of the litigants, it ought to have decided the constitutionality of these sections as amended.

The Court of Appeals nevertheless considered the amendments of §6(1) and §6(4) to be a "voluntary abandonment" of conduct challenged by the Appellees. App. 17-18. Therefore, the court applied the relevant exception to the mootness doctrine, and held that the issues in those sections were not moot because the State could "return to its old ways" by re-adopting the old versions of §6(1) and §6(4). App. 20.

While it is true that voluntary cessation of allegedly illegal conduct will not, standing alone, dispel a controversy, it will have this effect if (1) "it can be said with assurance that

there is no reasonable expectation that the alleged violation will recur," and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979).

The amendments to §6(1) and §6(4) clearly fulfill the second of these criteria. Since Appellees' challenge is purely facial in nature, amendment of these provisions cures whatever "chilling" effect the unamended provisions may have had upon Appellees.

The first criterion is also satisfied because there can be no reasonable expectation that the old provisions of §6(1) and §6(4) will ever be re-enacted. The amendment of these sections did not constitute an abandonment by the State of any regulation of abortion, but

rather, consisted entirely of "fine-tuning" which left fully intact the substantive protection of the life and health of the fetus. Under both the old sections and the new, the General Assembly sought to maximize the chances of fetal survival after abortion. It did not simply repeal certain langauge with an intent to moot a constitutional challenge, and then re-enact the same langauge at a later date. Cf. City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 289 (1982).[11]

As the Court of Appeals acknowledged, "the State has attempted repeatedly to alter the contours of that statute [the Illinois Abortion Law] to

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11. Moreover, unlike a municipal ordinance, a state statute is far more difficult to enact. This is especially so in the sensitive area of abortion where, as here, a 3/5 majority vote was necessary to override the gubernatorial vetoes of S.B. 47 and H.B. 1399.

reflect the latest judicial pronouncements in the area of abortion and privacy." App. 20. However, the General Assembly, in the context of abortion regulation, has never repealed a challenged provision, and subsequently re-enacted the provision at a later date. The Court of Appeals would impose upon the State the impossible burden of proving that the Abortion Law will never be amended to turn back the clock on §6(1) and §6(4). Suffice to say, all prior conduct is to the contrary, and hence, there is no reasonable expectation that the General Assembly would ever "return to its old ways" in this manner. Thus, the court clearly erred in addressing old §§6(1) and 6(4) as they stood unamended and repealed.

In addition, the Court of Appeals erred in holding that a live controversy

existed as to §6(1) due to the possibility of prosecutions for violations occuring during the eight months this provision was in effect. Such prosecutions, while a theoretical possibility, do not create a case or controversy adequate for adjudication. "[T]he mere existence of a state penal statute [is an] insufficient ground . . . to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." Poe v. Ullman, 367 U.S. 497, 507 (1976) (citations omitted). The facial attack in the case at bar was upon vagueness and overbreadth grounds. Appellees were permitted standing because they claimed that old §6(1) would have a chilling effect on the performance of abortions after viability. Since

§6(1) has been amended, it is impossible for the old §6(1) to have such a chilling effect; hence, Appellees' standing to challenge this provision has collapsed. In the exceedingly unlikely event that old §6(1) should ever be applied against any individual Appellee, that individual could, at that time, challenge the statute's application to him.

Furthermore, the enforcement agencies have consistently disclaimed the interpretation of old §6(1) adopted by the court that the State may "second-guess" the attending physician's determination of viability. See this Jurisdictional Statement at 48. The amendments to §6(1) clarify and formalize this position. Hence, the "threat" of enforcement of the old §6(1) has no basis in reality. Indeed, Appellees made no claim that they had

violated old §6(1), even under their tortured construction of the provision, nor have they alleged that they performed any late-term abortions to which old 6(1) would apply. Accordingly, Appellees lack any basis to argue that a live case or controversy exists concerning old §6(1).

However, a live case or controversy does exist with regard to the amended version of §6(4). The basis of Appellees' challenge to the new §6(4) is identical to their challenge of the old §6(4): that any regulation of abortion in the interest of the fetus prior to viability is invalid. Accordingly, the issues to be adjudicated are the same, whether this Court reviews the old §6(4) or the amended verison which is currently under review in Keith v. Daley. Consequently, in the interests of judicial economny, it would be appropriate

for this Court to review §6(4) as it now stands, since this version of §6(4) represents a live controversy that will ultimately be brought before this Court by the same class of plaintiffs presently before this Court.

The questions raised by the Court of Appeals' misinterpretation of and extreme departure from this Court's holdings on mootness are substantial and require supervisory review by this Court.

3. If it did not err in addressing old §6(1), whether the Court of Appeals, in light of the State's compelling interest in post-viable fetal life, nevertheless erred, in disregarding basic rules of statutory construction to strike down a statute, capable of constitutional construction, that established a standard of care applicable to fetuses known to be viable.

This Court in Roe v. Wade and its progeny has repeatedly held that the State has a compelling interest in fetal life at the stage of viability, which authorizes the State to "proscribe abortions altogether, 'except when necessary to preserve the life or health of the mother.'" Akron, 103 S.Ct. 2481, 2492 (1982), Roe, 410 U.S. at 163-64. Regulations at the point of viability are constitutional as long as they are "reasonably designed to further" the compelling interest in fetal life. Akron, 103 S.Ct. at 2495, Danforth, 428 U.S. at 80. Old §6(1) established a standard of

care that was protective of viable fetuses on whom the State has a compelling interest. It did not require any increased risk to the mother and was, therefore, constitutional.

It is well settled that "[w]here fairly possible, courts should construe a statute to avoid the danger of unconstitutionality." Planned Parenthood v. Ashcroft, 103 S.Ct. 2517, 2526 (1983). Also, "[i]n evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." Kolender v. Larson, 103 S.Ct. 1855, 1857 (1983). It was possible for the Court of Appeals to construe old § 6(1) in a constitutional manner, so that the determination of viability was left to "the attending physician on the particular facts of the

case before him." Colautti v. Franklin, 439 U.S. 379, 388 (1979). The court erred in failing to do so.

Section 6(1) did not conclusively specify that the attending physician's determination of viability controls. Rather, it provided that "no person" who performs an abortion "after the fetus is known to be viable" shall fail to exercise the required standard of care. However, the statute easily could have been construed as allowing only the attending physician's determination of viability to control. Indeed, the district court rejected the vagueness challenges upon which the statutes was ultimately struck and upheld §6(1). Charles v. Carey, 579 F.Supp. 464, 472-73 (N.D. Ill. 1983). Thus, it was not only possible but reasonable to construe the statute in a constitutional manner.

Moreover, those charged with enforcement of the law State's Attorney Daley and Attorney General Hartigan, consistently construed §6(1) in a manner that made it clear that the attending physician's judgment of viability was to control. Brief in Court of Appeals at 10 (adopted by Defendants Daley and Hartigan). This limiting construction must be considered by the federal court especially in a facial challenge. Kolender, 103 S.Ct. at 1857. The Court of Appeals erred in completely ignoring this limiting construction.[12]

The State has a compelling interest in protecting post-viable fetal life. Roe v. Wade, 410 U.S. 113, 153 (1973). That

12. Although the State of Illinois chose to affirmatively amend 6(1) to streamline the section and more explicitly state its intentions, and better trade the langauge of new sections of the law, this does not mean that it felt that old §6(1) was unconstitutional.

interest was effectively nullified by the Seventh Circuit's failure to apply basic rules of statutory constuction as it was required to do. This failure on the part of the Court of Appeals presents yet another substantial question meriting this Court's review.

4. Whether the State of Illinois can protect its strong interest in fetal life by requiring that the method of abortion be used that is most likely to preserve the life of the fetus, at that time in pregnancy when the fetus has a reasonable possibility of survival?

The State has a legitimate interest in protecting fetal life throughout pregnancy which grows in substantiality as the pregnancy advances. Roe, 410 U.S. at 163-64. The State of Illinois has sought to further its interest in protecting fetal life by regulating the method by which an abortion may be performed so as to maximize the chances for fetal survival. To this end, §6(4) requires that the method of abortion most likely to preserve the life and health of the fetus be utilized when there is a reasonable possibility of fetal survival. Section 6(4) does not apply when the fetal survival method of abortion would increase risk to the mother. See §6(5), App.60.

Thus, the State has sought to further its legitimate interest in protecting the fetus without in any way infringing upon the woman's right to terminate her pregnancy.

The only effect of §6(4) is to restrict hostile activity directed toward the fetus. In no circumstance does §6(4) place any obstacle on the decision of whether or not to terminate the pregnancy. The woman remains free to consult with her physician and decide to terminate her pregnancy for whatever reason she and her physician decide upon. She also remains free to effectuate the decision by legally terminating her pregnancy. Section 6(4) only restricts the manner in which the termination of pregnancy--emptying of the womb--can take place. And, it does so in a manner that is consistant with the preservation

of the woman's health.

Since §6(4) operates when there is a reasonable possibility of sustained survival of the fetus outside the womb, it is correct to say that it operates prior to "legal" viability; a stage in pregnancy when the State's interest in protecting fetal life has not yet become compelling.

As a constitutional matter, the concept of "viability" is relevant only during pregnancy, prior to birth. It is not applicable to infants after birth. Moreover, "viability" amounts to a physician's informed estimate, while a child is yet in the womb, about the likelihood of that child's survival outside the womb. Only when the physician judges that there is a reasonable likelihood of sustained survival does the State acquire a "compelling interest" in the fetus suf-

ficient to override, to some extent, the still extant constitutional right of the woman to terminate her pregnancy. The concept of viability as a legal principle is, thus, fixed as a subjective judgment upon which no liability can attach. Colautti, 439 U.S. at 381. The physician's good faith judgment of non-viability, however, is not necessarily accurate medically.[13] Thus, it is also correct to say that §6(4) operates during a time when the fetus may in actuality survive an abortion--a stage when the State's interest in fetal life is, at least, very substantial.

Therefore, although a particular

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13. Even the most advanced techniques of estimating gestatinal age have an error rate of plus or minus two weeks. See, e.g., Margaret S. v. Edwards, 488 F.Supp. 181, 198 (E.D. La. 1980).

fetus may not be viable in a legal sense, non-viable fetuses can and do actually survive abortion. Although many of these newborns die soon after birth, some survive indefinitely. See, e.g., Stroh & Hinman, 126 Am.J. Obstet. Gynecol. 83 (1976) (2 children survived saline abortions and were living with adoptive parents).

Section 6(4) does not seek to prohibit any abortions during the stage when the fetus is not quite legally viable. It merely seeks to regulate the manner in which the abortion is performed without increasing risk to the mother. The various methods of abortion cause greater or lesser complications for the fetus. It is logical for the State to seek to minimize the damage that will be done to the fetus by the abortion procedure, so that if the fetus should survive the

abortion he or she will not be more severely handicapped than is necessary.

Proper balancing of the state interest and the woman's right of privacy dictates that §6(4) be upheld. The abortional right, as recognized by the Supreme Court, is a right to decide whether or not to terminate pregnancy (to expel the fetus from the womb) and to safely effectuate the decision. Roe v. Wade, 410 U.S. at 153, Connecticut v. Menillo, 423 U.S. 9, 10 (1975).

The right does not include a right to actively seek to kill the fetus when there is a reasonable possibility that the fetus is capable of sustained survival outside the womb. No court has ever held that the right secured in Roe is so expansive. In fact, such a notion has been specifically rejected. In Wynn v. Scott, the court noted:

> [The statute] does not require that the physician increase the risk to the woman in order to save the fetus. If, however, there are instances where a physician has a choice of procedures, both of equal risk to the woman, the physician must choose the procedure which is least likely to kill the fetus. This choice would not interfere with the woman's right to terminate her pregnancy. It never could be argued that she has a constitutionally protected right to kill the fetus. She does not.

Wynn v. Scott, 449 F.Supp. 1302, 1321 (N.D. Ill. 1978), (Circuit Judge Tone and District Judges Marshall and Kirkland), aff'd sub nom., Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979).

Despite the substantiality of the State's interest in the fetus who has a reasonable possibility for sustained survival, and the fact that §6(4) does not infringe upon a woman's right to terminate her pregnancy as that right has been recognized by this Court, the Court of Appeals held that the State could not

constitutionally regulate abortion in this manner. App.36.

The court's analysis is seriously flawed. The court assumes that there is a burden upon the woman's right to terminate her pregnancy without first examining the scope of that right or the nature of the supposed burden.

Sound constitutional analysis cannot proceed by the mechanistic approach taken by the court. The court simply states that the regulation operates prior to viability and therefore cannot support the State's regulation on behalf of fetal life. App.35.

The implication of its decision is that the State's interest in the fetus is non-existent prior to viability, and then suddenly becomes compelling at viability. Such is not the case. As mentioned earlier, that interest grows in

substantiality and at the time when §6(4) operates is just shy of compelling.

Moreover, the court totally failed in a proper analysis of the supposed burden that this section imposes upon a woman. The woman has no right to kill her fetus. She has only a right to terminate her pregnancy in a safe manner. Section 6(4) regulates the method of abortion without increasing risk to the mother. Therefore, a woman remains free to obtain a safe pregnancy termination for whatever reason she wishes. In spite of this, the Seventh Circuit held that §6(4) did impose a burden on a woman because there is a "possibility that the woman will be unable to exercise her privacy right because her doctor refuses to perform an abortion at the risk of inducing criminal sanction." App.34.

This circular analysis begs the

uestion that is critical to a principled onsitutional analysis of §6(4). That uestion is whether the woman has a onstitutional right to terminate her regnancy in a manner that ensures fetal eath. If she does not have such a ight, then she has no constitutionally rotected right to obtain an abortion by method that will ensure fetal death. er inability to obtain such an abortion ould not be said to violate any consti- utional right.

To hold otherwise would be contrary o common sense and the holdings of this ourt. For example, under the court's nalysis, it would be impermissible for a tate to require that all abortions be erformed by a physician since the refu- al of doctors, in certain areas of the ountry, to perform any abortions would

limit the woman's access to abortion and would constitute an unconstitutional burden on the woman's right to terminate her pregnancy.

Such analysis was explicitly rejected by the Court in Connecticut v. Menillo, 432 U.S. at 10. In Menillo, the Court first determined that a woman does not have a constitutional right to obtain an abortion in an unsafe manner. Since she has no constitutional right to obtain an abortion by a nonphysician, the Court held that a state statute requiring that all abortions be performed by physicians did not violate the woman's right to terminate her pregnancy. Id.

Moreover, sound constitutonal adjudication requires close attention to what consequences flow from "state action" and what consequences flow from unrelated

rivate decisions and conduct. The former may be conceived as "burdens" on the right to abort, while the latter lack constitutional significance. Particularly close attention to this distinction is warranted in the present context since it is claimed that the private refusal of doctors to provide abortions using the method most likely to cause fetal survival imposes a consitutional burden on a woman's right to terminate her pregnancy by limiting her access to abortions.

The requirements of §6(4) neither coerce nor significantly encourage any physician to refuse to perform abortions by the method most likely to result in fetal survival. Thus, the private decisions of some physicians to refuse to perform all abortions when there is a reasonable possibility of fetal survival, simply because they are unable to perform

them by a method that would ensure fetal death, cannot be attributed to the State.

The main issue presented in the challenge to old §6(4) and upon which both the District Court and the Court of Appeals ruled is identical to that raised against new §6(4).[14]

There is a substantial question presented for review by this Court. That question concerns the State's ability to regulate prior to legal viability on behalf of the fetus in a manner that does not infringe upon a woman's right to terminate her pregnancy. Central to this question is the appropriate scope of the right to terminate pregnancy. Does it include a right to kill the fetus? Or, does it simply include a right to safely

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14. Although changes in the statutory language substantially removed other minor issues from continued controversy, the primary issue remains unaltered in new §6(4).

erminate pregnancy? These issues equire the plenary review of this Court.

CONCLUSION

Probable jurisdiction should be oted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-3175, 83-3176, 83-3177, 83-3253

ALLAN G. CHARLES, M.D., et al.,
Plaintiffs-Appellees/Cross-Appellants,
v.
RICHARD M. DALEY, et al.,
Defendants/Appellants/Cross-Appellees,
EUGENE F. DIAMOND, M.D., et al.,
Intervening Defendants-Appellants/
Cross-Appellees.

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,
Plaintiffs-Appellees,
v.
RICHARD M. DALEY, et al.,
Defendants-Appellants,
EUGENE F. DIAMOND, MD., et al.,
Intervening Defendants-Appellants

Appeals from the United States District Court for the Northern District of Illinios, Eastern Division.
Nos. 79-C-4541, 79-C-4548;
Charles Kocoras, Judge.

Argued September 19, 1984--
Decided November 30, 1984

Before WOOD, Circuit Judge, PELL, Senior Circuit Judge and CAMPBELL, Senior District Judge.*

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* William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

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PELL, Senior Circuit Judge.

This case confronts the court with the review of cross-motions for summary judgment. Defendants Richard M. Daley, Illinois State's Attorney, et al., and intervening defendants Dr. Eugene F. Diamond and Dr. Jasper F. Williams appeal from the district court's grant of a permanent injunction against the enforcement of three sections of the Illinois Abortion Law.1/ Defendants and intervening defendants also appeal from the district court's grant of plaintiffs' motion to strike intervening defendants' Exhibit 2, which intervening defendants affixed to their motion for summary judgment. Intervening defendants Exhibit

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1. District Judge Charles Kororas entered a permanent injunction against the enforcment of sections 6(4), 2(10) and 11(d) of the Illinois Abortion Law of 1975, as amended by S.B. 47 and S.B. 666, on October 14, 1983.

2 contained excerpts from a newspaper series entitled The Abortion Profiteers.

Plaintiffs Dr. Allan G. Charles, et al., and The Hope Clinic for Women, Ltd., et al., appeal from the district court's denial of their motion for a permanent injunction against the enforcement of section 6(1) of the Illinois Abortion Law. The district court declined to enjoin section 6(1) because the court found that a recent amendment to the Abortion Law, which section 6(1) incorporated, removed section 6(1)'s constitutional infirmities.

Section 6(1), along with section 6(4), was the subject of a preliminary injunction entered by then District Judge Joel Flaum on November 16, 1979. Judge Flaum enjoined these sections because they incorporated an unconstitutional definition of viability. Judge Flaum

declined to enter a preliminary injunction against sections 2(10) and 11(d).

Plaintiffs appealed Judge Flaum's denial of a prelmiminary injunction with respect to sections 2(10) and 11(d) to this court. This court disagreed with Judge Flaum and found plaintiffs entitled to a preliminary injunction of these sections. Charles v. Carey, 627 F.2d 772, 789-90 (7th Cir. 1980). This court ruled that the sections failed to pass constitutional muster because the sections forced physicians "to act as the mouthpiece for the State's theory of life." Id.

Plaintiffs moved for summary judgment on the basis of these preliminary injunctions and sought the entry of a permanent injunction against sections 6(1), 6(4), 2(10) and 11(d). Defendants and intervening defendants also sought

summary judgment on the basis that the preliminary injunctions against these sections were erroneously entered. As previously noted, Judge Kocoras of the District Court granted plaintiffs' motion for a permanent injunction against the enforcement of sections 6(4), 2(10) and 11(d). Judge Kocoras granted defendants' and intervening defendants' motion for summary judgment with respect to section 6(1). Judge Kocoras furthermore struck intervening defendants' Exhibit 2, which intervening defendants submitted in support of their motion for summary judgment. These rulings by the district court form the basis of this appeal.

I. THE STATUTE

A. Section 6(1)

Section 6(1) of the Illinois Abortion Law of 1975, as amended by S.B.

47, S.B. 666 and H.B. 1399 2/ imposes a standard of care on physicians who perform abortions on a viable fetus. Section 6(1), as it existed at the time plaintiffs, defendants and intervening defendants moved for summary judgment, read as follows:

> No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a viable fetus or infant results from such failure.

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2. S.B. 47 took effect October 30, 1979. S.B. 666 took effect September 17, 1983. H.B. 1399 took effect June 30, 1984.

ILL. REV.STAT. ch. 38, ¶81-26 (1983). On September 17, 1983, the Illinois legislature amended its definition of viability and incorporated this amendment into section 6(1). The amendment made viability a subjective determination based on the medical judgment of the attending physician. Judge Kocoras evaluated section 6(1) with reference to this intervening amendment.

On June 30, 1984, the Illinois legislature amended section 6(1) again. This recent amendment substantially transformed section 6(1). The amendment is the subject of a temporary restraining order entered by the Northern District of Illinois in Keith v. Daley, No. 84 C 5602 (N.D.Ill. 1984), a separate lawsuit. This court accordingly declines to discuss the constitutionality of the 1984 amendment.

B. Section 6(4)

Section 6(4) of the statute, as amended, imposes a similar standard of care on physicians performing abortions on a possibly viable fetus. When plaintiffs, defendants and intervening defendants filed their motions for summary judgment in the district court, section 6(4) read, in pertinent part:

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and/or health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of more than momentary survival of the fetus, apart from the body of the mother, with or without artificial support.

ILL.REV.STAT. ch. 38, ¶81-26 (1983). District Judge Kocoras permanently enjoined section 6(4) despite the 1983

amendment to the statute's definition of viablity, which section 6(4) incorporated. In 1984, H.B. 1399 substantially altered section 6(4). Because this amendment to section 6(4) is also the subject of the temporary restraining order entered in Keith v. Daley, No. 84 C 5602 (N.D.Ill. 1984), this court declines to evaluate its constitutionality.

C. Sections 2(10) and 11(d)

Section 2(10) of the Illinois Abortion Law of 1975, as amended by S.B. 47, defines an "abortifacient" method of birth control. Section 11(d) of that statute requires a physician who prescribes an "abortifacient" method of birth control to inform his patient that he has done so. The Illinois legislature enacted these sections as follows:

> Sec. 2(10). "Abortifacient" means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when

> employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.
>
> Sec. 11(d). Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact and abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for which it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

ILL.REV.STAT. ch. 83, ¶¶81-22, 81-31 (1983). Unlike sections 6(1) and 6(4), sections 2(10) and 11(d) are not the subject of recent amendment, and are not before the district court in Keith v. Daley, supra. This court will accordingly address the constitutionality of these sections in their current form.

II. MOOTNESS

Before reaching the constitutionality of sections 6(1), 6(4), 2(10) and 11(d), however, this court must address the issue of mootness. During oral argument before this court, intervening defendants suggested for the first time that plaintiffs' constitutional challenges to sections 6(1) and 6(4) were moot. Intervening defendants based their mootness argument on the fact that the Illinois legislature had amended both sections during the pendency of this appeal. Because H.B. 1399 and its amended sections 6(1) and 6(4) superseded the versions of those sections reflected in S.B. 47, intervening defendants argue that these superseded versions cannot threaten the exercise of plaintiffs' constitutional rights. Consequently, intervening defendants contend, the

constitutionality of S.B. 47's version of sections 6(1) and 6(4) is not a live controversy. Intervening defendants therefore assert that this court is without power to review them.

The concept of mootness, indeed, defines constitutionally minimal conditions for the invocation of federal judicial power. Franks v. Bowman Transportation Co., 424 U.S. 747, 754, 96 S.Ct. 1251, 1259, 47 L.Ed.2d 444 (1976). Moreover, a moot case does not present a "case or controvesy" within the meaning of Article III. See Geraghty v. United States Parole Commission, 579 F.2d 238, 245 (3d Cir. 1978)(extensive discussion of the mootness doctrine), vacated on other grounds, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). However, the determination of which cases survive the limitations imposed by the mootness

doctrine and which cases do not is not a facile endeavor. As this court recently observed in Commodity Futures Trading Commission v. Board of Trade, 701 F.2d 653, 655 (7th Cir.1983):

> Although mootness is sometimes painted in black and white--"federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them," ... it really should be painted in shades of gray since few controversies are wholly beyond the power of changed circumstances to revive....

(Citing North Carolinia v. Rice, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). This court, accordingly, shall examine the mootness issue in this case with awareness that our determination must respect the "fundamental policies informing the 'cases or controversies' limitation imposed by Article III." Franks v. Bowman Transportation Co., 424 U.S. at 754, 96 S.Ct. at 1259. In addition, this court

acknowledges that a defendant alleging mootness carries a heavy burden of persuasion. See United States v. Phosphate Export Association, Inc., 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968); Sanchez v. Edgar, 710 F.2d 1292, 1294-95 (7th Cir. 1983); Halet v. Wend Investment Co., 672 F.2d 1305, 1308 (9th Cir.1982).

A. Section 6(1)

Section 6(1) of S.B. 47 was the subject of a preliminary injunction entered by Judge Flaum on November 16, 1979. Judge Kocoras refused to make this injunction permanent with respect to section 6(1), however, because he believed that an intervening amendment to the section's definition of viability removed its constitutional infirmities.

As a result, the S.B. 47 version of section 6(1) remained in effect from October

14, 1983, the date of Judge Kocoras' decision, until June 30, 1984, the date H.B. 1399 superseded S.B. 47.

S.B. 47 made the violation of section 6(1) a Class 2 felony if the death of a viable fetus or infant occurred as the result of an abortion. ILL.REV.STAT. ch. 38 ¶81-26 (1983). The statute of limitations for such Class 2 felonies allows the State a period of three years from the date of the offense within which to commence prosecution. ILL.REV.STAT. ch. 38 ¶3-5 (1983). This three year period is still running with respect to violations of section 6(1) which occurred between October 14, 1983, and June 30, 1984. Thus, the State of Illinois could prosecute plaintiffs for violation of S.B. 47's section 6(1) if plaintiffs violated that section while it remained in effect.

We find this possibility insufficiently speculative to render plaintiffs' challenge to the S.B. 47 version of section 6(1) moot. Defendants and intervening defendants have offered no evidence to rebut this possiblity of prosecution. As a result, this court finds plaintiffs' challenge to S.B. 47's section 6(1) a live controversy within the meaning of Article III.

B. Section 6(4)

Judge Flaum preliminarily enjoined the enforcement of S.B. 47's section 6(4) on November 16, 1979. Judge Kocoras made this injunction permanent approximately four years later. Judge Kocoras did not believe that the statute's amended definition of viability could salvage section 6(4) because section 6(4) continued to regulate pre-viability abortions.

Unlike section 6(1), section 6(4)

has been subject to continuous injunction since plaintiffs' initial challenge to its constitutionality in 1979. Thus, this court's mootness analysis with respect to section 6(10) is inapposite to the alleged mootness of section 6(4). Nevertheless, this court finds that plaintiffs' challenges to both sections present live controversies despite the intervening amendments to these sections reflected in H.B. 1399.

The State's revision of section 6(4) pending this appeal implicates a well-known line of mootness cases. 3/ See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982); Quern v.

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3. The State's revision of section 6(1) pending this appeal likewise implicates this line of cases. In the case of section 6(1), however, there are additional and more compelling reasons to avoid a mootness holding.

Mandley, 436 U.S. 725, 98 S.Ct. 2068, 54 L.Ed.2d 658 (1978); United States v. Phosphate Export Association, Inc., 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). This line of cases focuses on a defendant's voluntary abandonment of conduct challenged by a plaintiff. Many of these cases involve revisions to allegedly illegal procedures, ordinances or statutes pending a plaintiff's appeal. By revising their allegedly illegal measures, defendants in these cases seek to moot plaintiffs' appeals.

A recent example of such voluntary abandonment confronted the Supreme Court in City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). In that case, plaintiff Aladdin's Castle contended that a municipal zoning ordinance was unconstitutionally vague. During the pendency

of plaintiff's appeal, defendant city revised the ordinance and removed its objectionable langauge. The Supreme Court held that this revision did not moot plaintiff's appeal. Id. 455 U.S. at 289, 102 S.Ct. at 1074. The Supreme Court observed, in so holding:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cesstion of allegedly illegal conduct does not moot a case; if it did the courts would be compelled to leave "[t]he defendant ... free to return to his old ways."

Id. at 289 n. 10, 102 S.Ct. at 1074 n. 10 (citing United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953)).

Like the defendant city in Aladdin's Castle, the State of Illinois could re-enact S.B. 47's version of section 6(4) if this court dismissed plaintiffs' challenge to that section. Indeed, the very number of amendments made to the

challenged statute in the last several years persuades this court that such a result would not be unlikely. Moreover, the history of the Abortion Law suggests that the State has attempted repeatedly to alter the contours of that statute to reflect the latest judicial pronouncments in the area of abortion and privacy. As a result, defendants and intervening defendants have failed to prove to this court that the State will not "return to its old ways' if the court dismisses plaintiffs' claim.

In addition, defendants and intervening defendants have not demonstrated that H.B. 1399 irrevocably eradicted the effects of the challenged version of section 6(4). Defendants and intervening defendants have not demonstrated, for example, that any chilling effects caused by that section no longer exist. Recent

Supreme Court cases dealing with the mootness issue suggest that such eradicatation is an additional prerequisite to mootness. See City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); County of Los Angeles v. Davis, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979). Consequently, defendants and intervening defendants have not convinced this court that plaintiffs' challenge to section 6(4) is moot. The court will address the constitutionality of each of the challenged sections in turn.

III. CONSTITUTIONAL ANALYSIS

In its seminal opinion in the case of Roe v. Wade, 410 U.S. 113, 153, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973), the Supreme Court decided that a woman's fundamental right of privacy, which derived from the Fourteenth Amendment's

concept of personal liberty, encompassed a woman's decision whether to terminate her pregnancy. Earlier opinions by the Court had established that a woman's right of privacy encompassed her freedom of choice regarding activities related to marriage and contraception. See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). The Roe opinion extended the reasoning of such earlier cases to a woman's decision whether to procure an abortion.

In Roe, the Court additionally identified certain interests of the State which competed with the woman's interest in freely choosing abortion. These State interests were the protection of maternal health and the preservation of fetal life. Roe, 410 U.S. at 150, 93 S.Ct. at 725. The State's interest in protecting maternal health became compelling at the

end of a woman's first trimester of pregnancy. Id. at 163, 93 S.Ct. at 731. The State's interest in preserving fetal life became compelling at the stage of viability. Id. Prior to the stages at which the State's interests became compelling, the State could not interfere with the woman's decision, in consultation with her physician, to abort her fetus. Id. at 165-66, 93 S.Ct. at 732-733.

Cases subsequent to Roe have reaffirmed its analysis. These cases have stricken various attempts by the State to discourage a woman from choosing abortion. See, e.g., Planned Parenthood v. Ashcroft, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983); Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion); Colautti v. Franklin, 439 U.S. 379, 99

S.Ct. 675, 58 L.Ed.2d 596 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). At the same time, however, the Supreme Court has acknowledged that the State may encourage alternatives to abortion in ways that do not interfere with a woman's decision. See Williams v. Zbaraz, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980); Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2 784 (1980); Poelker v. Doe, 432 U.S. 519, 97 S.Ct. 2391, 53 L.Ed.2d 528 (1977)(per curiam); Maher v. Roe, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977). The Supreme Court, furthermore, has upheld a requirement that second trimester abortions be performed in a licensed clinic, Simopoulos v. Virginia, 462 U.S. 506, 103 S.Ct. 2532, 76 L.Ed.2d 755 (1983), and a requirement that parents of imma-

ture, dependent minors receive notice of their child's attempt to procure an abortion, H.L. v. Matheson, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981). This court must evaluate the State of Illinois' attempts to regulate the performance and procurement of abortions in light of the post-Roe decisions.

A. Section 6(1)

Section 6(1) of S.B. 47 imposes a standard of care on physicians and others who assist physicians in the performance of abortions on a viable fetus. That section makes it a Class 2 felony to fail to use the same care in aborting a viable fetus that the physician, or his assistant, would be required to use in bringing a viable fetus to live birth. To be liable under the section, a physician or his assistant must intend to terminate the mother's pregnancy and must

intentionally fail to use the requisite degree of care in performing the abortion.

Section 6(1) applies when the fetus is "known to be viable." Section 6(1) does not specify, however, which party, physician or assistant, must make this viability determination. Consequently, the section could make criminal an assistant's failure to use the requisite care in aborting a fetus which the assistant, but not the physician, believes in [sic] nonviable. In addition, the section could make criminal a physician's failure to observe the required standard of care in situations where some other physician, but not the treating physician, believes that the fetus is viable.

This court acknowledges that the State's interest in preserving fetal life is compelling at the stage of viability.

See Roe v. Wade, 410 U.S. at 163, 93 S.Ct. at 731. The State, therefore, may regulate abortions at or after the stage of viability even if the State's regulations interfere with a woman's fundamental right to choose abortion. 4/ However, the State may only regulate in such context if it narrowly tailors its regulations to the precise State interest at stake. Roe, 410 U.S. at 165, 93 S.Ct. at 732.

Moreover, in serving its compelling interest, the State must respect the physician's central role in consulting with the woman and in determining how to carry out her abortion. See Colautti v. Franklin, 439 U.S. at 387, 99 S.Ct. at

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4. The Roe decision makes clear that a State may even proscribe abortion after the stage of viability, except where abortion is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Roe, 410 U.S. at 164-65, 93 S.Ct. at 732.

681. In particular, the State may not interfere with the attending physician's medical judgment in determining the precise point in a woman's pregnancy at which viability exists. Id. 439 U.S. at 395-96, 99 S.Ct. at 685-86. "[T]he determination of whether a particular fetus is viable is, and must be, a matter for the responsible attending physican." Planned Parenthood v. Danforth, 428 U.S. at 64, 96 S.Ct. at 2839. Because section 6(1) does not specify that the attending physician's viability determination alone shall govern, section 6(1) improperly encroaches on the attending physician's medical judgment in treating his patient.

This court does not hold that the State may never prescribe standards of care to physicians, or their assistants, who perform abortions on a fetus which has attained viablity. Rather, this

court holds that when the State prescribes such standards, it must afford due deference to the conclusive viability determination of the attending physician. In addition, the State must precisely tailor its standards of care to the particular State interest at stake so that its statute precisely notifies physicians and their assistants as to what conduct by them the State purports to condemn. Section 6(1) fails to give physicians and their assistants such explicit notice. Under these circumstances, the State must proceed with greater precision before it may subject a physician, or his assistant, to criminal sanction. Colautti v. Franklin, 439 U.S. at 400-01, 99 S.Ct. at 688.

Where a vague statute "abuts upon" the exercise of fundamental rights, the statute "operates to inhibit the exercise

of such freedoms." Planned Parenthood Association v. Fitzpatrick, 401 F.Supp. 554, 571 (E.D.Pa.1975) (citing Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972)), aff'd sub nom. Franklin v. Fitzpatrick, 428 U.S. 901, 96 S.Ct. 3202, 49 L.Ed.2d 1205 (1976). Because this section abuts upon a woman's fundamental right to consult her doctor about abortion and to receive her doctor's unimpeded medical judgment, it threatens to chill the exercise of her freedom. Specifically, the section encumbers the woman's exercise of a constitutionally protected right by placing obstacles in the form of criminal sanctions in the path of the doctor upon whom she is entitled to rely for advice. Akron Center For Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172, 1198 (N.D.Ohio 1979)(citing Whalen v.

Roe, 429 U.S. 589, 604, 97 S.Ct. 869, 879 51 L.Ed.2d 64 (1977)), aff'd in part and rev'd in part, 651 F.2d 1198 (6th Cir. 1981), aff'd in part and rev'd in part, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). The section imprecisely informs physicians and their assistants as to what conduct by them the State prohibits. The section, therefore, threatens to chill the exercise of a physician's best medical judgment in consulting with his patients about abortion. The State has failed to reflect precisely its compelling postviability interests by drafting a statute affording physicians, and their assistants, due notice before the State subjects them to criminal sanction. As a result, this court finds section 6(1) unconstitutionally vague. 5/

5. The statute's amended definition of viability, reflected by S.B. 666, does not alter our result, because section 6(1) still fails to inform the physician as to whose viability determination controls.

B. Section 6(4)

Section 6(4) of S.B. 47 imposes a similar standard of care on physicians and their assistants who perform abortions on a possibly viable fetus. Section 6(4) makes it a Class 3 felony to fail to observe the same standard of care in aborting a possibly viable fetus that the physician, or his assistant, would be required to observe in bringing a possibly viable fetus to live birth. Like section 6(1), criminal liability under section 6(4) requires that the physician or his assistant intend to terminate the mother's pregnancy, and that the physician or his assistant intentionally fail to observe the required standard of care.

Unlike section 6(1), however, section 6(4) purports to regulate not only the abortion of a viable fetus, but also the abortion of a fetus which is

potentially viable. Thus section 6(4) purports to regulate the performance of abortions at a stage prior to viability. As Roe v. Wade, 410 U.S. at 163, 93 S.Ct. at 731, makes clear, the State's interest in preserving fetal life is not compelling before the viability stage. As a result, the State must present a different compelling interest to justify the direct interference with a woman's freedom to choose an abortion that section 6(4) represents.

In particular, section 6(4) creates a direct interference with a woman's right to discuss abortion with her physician and to receive her physician's unimpeded medical judgment because section 6(4) places obstacles in the form of criminal sanctions in the path of the physician upon whom she is entitled to rely for advice. See Akron

Center For Reproductive Health, Inc. v. City of Akron, 479 F.Supp. at 1198. Intervening defendants claim that the section creates no interference with the woman's right to choose abortion because the section penalizes only hostile activity toward the fetus unrelated to the exercise of the woman's privacy right. This contention ignores, however, the possibility that the woman will be unable to exercise her privacy right because her doctor refuses to perform an abortion at the risk of inducing a criminal sanction.

This court finds that such a possibility significantly burdens a woman's right to terminate her pregnancy. Because section 6(4) creates such a burden, the State must justify it by means of a compelling interest and must prove that it has tailored section 6(4) narrowly to protect only the legitimate

State interest at stake. Carey v. Population Services International, 431 U.S. 678, 688, 97 S.Ct. 2010, 2017, 52 L.Ed.2d 657 (1977)(citing Roe v. Wade, 410 U.S. at 155, 93 S.Ct. at 727). The Supreme Court has recognized two such compelling interests that may justify a restriction of the right to choose abortion. City of Akron v. Akron Center For Reproductive Health, Inc., 462 U.S. 416, 103 S.Ct. 2481, at 2491, 76 L.Ed.2d 687. One of these compelling interests, the State's interest in preserving fetal life, becomes compelling only at the stage of viabality. Roe v. Wade, 410 U.S. at 163, 93 S.Ct. at 731. As a consequence, the State's interest in preserving fetal life cannot justify section 6(4) because section 6(4) applies to certain pre-viability abortions.

The second compelling State interest

recognized by the Supreme Court in the area of abortion is the State's legitimate concern with the health of the woman. City of Akron, 103 S.Ct. at 2492. Section 6(4), however, penalizes hostile activity which is harmful to the health of the fetus and does not seek to protect the health of the mother. As a result, the State's legitimate concern with the health of the mother cannot justify section 6(4). Because the State has advanced no other compelling interest which could justify Section 6(4)'s restriction on a woman's freedom to choose an abortion, this court must find that section 6(4) unconstitutionally infringes on the woman's fundamental right. Section 6(4) is therefore invalid.

C. Sections 2(10) and 11(d)

Section 2(10) of S.B. 47 defines an

abortifacient as any substance or device which is known to cause fetal death. Section 11(d) of that statute requires physicians who prescribe or administer abortifacients to inform their patients that they have done so. If a physician intentionally, knowingly or recklessly fails to inform his patient that he has prescribed or administered an abortifacient, the physician commits a Class C misdemeanor.

Intervening defendants assert that the Illinois legislature passed sections 2(10) and 11(d) in order to protect those women who oppose abortifacient methods of birth control for moral and/or religious reasons. Intervening defendants also assert that the sections do not interfere with a woman's freedom to choose abortion, or her freedom to choose any method of birth control. Rather, intervening

defendants contend that the sections merely require physicians to give information to their patients concerning "what will be done [to them] and as to its consequences." Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8, 96 S.Ct. 2831, 2840 n.8, 49 L.Ed.2d 788 (1976).

In Danforth, the Supreme Court acknowledged that the State could require such a limited form of informed consent before a woman underwent an abortion. Id. The Court cautioned, however, that a more detailed requirement of informed consent could confine the attending doctor in an undesired and uncomfortable straitjacket in the practice of his profession. Id. The Court later relied upon its cautionary remarks in Danforth to strike down a state's requirement that the physician recite a lengthy and inflexible list of information before his

patient could have an abortion. City of Akron v. Akron Center For Reproductive Health, Inc., 103 S.Ct. at 2501. The Court reaffirmed in that later case that the State could not intrude upon the discretion of the pregnant woman's physician. Id. at 2500.

The Supreme Court, moreover, has denied the states the power to override the rights of a pregnant woman by adopting one theory of when life begins. Roe v. Wade, 410 U.S. at 162, 93 S.Ct. at 731. See also City of Akron, 103 S.Ct. at 2500. In particular, the Court has prohibited the State from foisting upon the pregnant woman its view that life begins at conception in order to justify its regulation of abortion. City of Akron, 103 S.Ct. at 2500. See also Eubanks v. Collins, 10 Fam.L.Rep. (BNA) 1659 (W.D.Ky. Sept. 11, 1984). This

court finds that sections 2(10) and 11(d) constitute such an attempt by the State of Illinois because the sections incorporate a definition of "fetus" in which the State classifies a fetus as a human being from fertilization until death. ILL.REV.STAT. ch. 38 ¶81-21 (1983). As this court noted in Charles v. Carey, 627 F.2d 772, 789 (7th Cir. 1980), "the use of the term 'abortifacient' in describing certain birth control methods forces the physician to act as the mouthpiece for the State's theory of life."

Intervening defendants dispute that the sections require physicians to reiterate the State's theory that life begins at conception. Intervenors assert that, to the contrary, the sections merely require that physicians notify their patients that they are prescribing abortifacients, and not that the abor-

tifacients will kill their patients' unborn children. This assertion ignores both the State's definition of abortifacient, in which the State refers to "fetal death," and the State's definition of "fetus," which this court previously has described. However physicians choose to comply with the mandate of section 11(d), they nevertheless must notify their patients that the drug or device which they have prescribed will terminate the life of any fetus which their patients might be carrying. This section not only intrudes upon the medical discretion of the attending physician, but it also impermissibly imposes the State's theory of when life begins upon the physician's patient.

The State cannot justify this intrusion upon the physician-patient relationship by its interest in pro-

tecting maternal health or by its interest in preserving fetal life. The State's interest in protecting maternal emotional and physical health cannot justify sections 2(10) and 11(d) because the sections foist upon those women who prefer abortifacient methods of birth control the State's theory that abortifacients cause the death of unborn children. The State may not treat such women inequitably in order to protect the emotional health of women who oppose abortifacients. Likewise, the State's interest in preserving fetal life cannot justify sections 2(10) and 11(d) for two reasons. First, the sections operate in situations where the woman is not even pregnant. Second, when the woman is indeed pregnant, sections 2(10) and 11(d) impermissibly restrict the attending physician's discretion at a stage in the

mother's pregnancy at which neither of the State's recognized interests may be compelling. These sections additionally infringe upon a woman's constitutionally protected right of private decision-making in matters relating to contraception, with no countervailing State compelling interest. See Carey v. Population Services International, 431 U.S. at 688-89, 97 S.Ct. at 2017-18. As a result, sections 2(10) and 11(d) are unconstitutional.

IV. EXCLUSION OF EXHIBIT 2

Defendants and intervening defendants contend that the trial court improperly prevented them from demonstrating the existence of such a compelling State interest by the court's exclusion of intervening defendants' Exhibit 2. Exhibit 2 contained excerpts from a Chicago Sun-Times investigative series

entitled The Abortion Profiteers. Intervening defendants offered the excerpts in order to prove that the State had reason to fear that doctors in abortion clinics were not acting in their patients' best interests. In particular, intervening defendants sought to prove, by introduction of the excerpts, that doctors in abortion clinics commonly mislead their patients by trivializing the effects of an abortion. Intervening defendants also sought to prove that physicians in such clinics are primarily interested in their own monetary profit to the detriment of their patients' peace of mind. Intervening defendants contend that such abuses by doctors in abortion clinics justify the intrusion upon the physician-patient relationship presented by sections 2(10) and 11(d).

The district court excluded the

excerpts, noting that proof of the State's interest could not be made by means of a newspaper series. The court preferred evidence of a more factual nature, and, therefore, required the State to prove the need of sections 2(10) and 11(d) by evidence other than Exhibit 2.

Intervening defendants suggest that the district court thereby erroneously subjected Exhibit 2 to the requirements governing the introduction of adjudicative facts. Intervenors assert that the exhibit contained legislative facts, which need not be indisputable in order for a federal court to admit them into evidence. Intervenors assert that the court below should have considered the legislative facts reflected in their newspaper excerpts so that the court could evaluate properly the constitution-

ality of the two sections.

This court need not characterize t facts reported in the newspaper excerp as legislative or adjudictive facts order to review the district court' exclusion of the excerpts from evidence This court finds the excerpts simpl irrelevant to the constitutionality o Sections 2(10) and 11(d). The excerpt prove that certain doctors trivializ abortions and prefer monetary gain t preservation of their patients peace o mind. The excerpts do not prove that Illinois doctors misrepresent the nature of birth control methods which they prescribe for their patients or that Illinois doctors force women opposed to abortifacients to use them. The excerpts reveal no compelling State interest which justifies interference with a physician's medical discretion in consulting with his

patient about birth control. Moreover, the excerpts reveal no compelling interest which justifies an attempt by the State to foist upon any woman its theory of life. Whether the facts reported in the Sun-Times series are legislative or adjudicative in nature, this court finds them irrelevant to a constitutional analysis of sections 2(10) and 11(d).

Furthermore, this court acknowledges the substantial discretion of a trial judge in ruling on the relevancy of tendered evidence. This court consistently has accorded great deference to the evidentiary decisions of a trial court. United States v. Bouye, 688 F.2d 471, 476 (7th Cir. 1982). See also Gorby v. Schneider Tank Lines, Inc., 741 F.2d 1015, 1018 (7th Cir. 1984); United States v. Green, 735 F.2d 1018, 1026 (7th Cir.

1984); United States v. Sweeney, 688 F.2d 1131, 1144 (7th Cir. 1982). This court will not overturn such an evidentiary decision by a trial judge in the absence of a clear abuse of discretion. Gorby v. Schneider Tank Lines, Inc., 741 F.2d at 1018. This court finds no such clear abuse of discretion here. Thus, we defer to the district court's refusal to admit intervenors' Exhibit 2 into evidence.

V. CONCLUSION

The district court found sections 6(4), 2(10) and 11(d) of S.B. 47 unconstitutional and, accordingly, entered a permanent injunction against the enforcement of these sections. This court agrees that the above sections unconstitutionally infringe upon a woman's fundamental privacy right. This court, furthermore, finds section 6(1) of

S.B. 47 unconstitutional for the same reason. We therefore AFFIRM the district court's permanent injunction against sections 6(4), 2(10) and 11(d) and REVERSE the district court's judgment with respect to section 6(1). We direct the district court to enter a permanent injunction against the enforcement of section 6(1) on remand.

JUDGMENT--ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 30, 1984

Before
Hon. Harlington Wood, Jr. Circuit Judge
Hon. Wilbur Pell, Jr., Sr. Circuit Judge
Hon. William Campbell, Sr. District Judge*

Nos. 83-3175, 83-3176, 83-3177, 83-3253

ALLAN G. CHARLES, M.D., et al.,
Plaintiffs-Appellees/Cross-Appellants,
v.
RICHARD M. DALEY, et al.,
Defendants/Appellants/Cross-Appellees,
EUGENE F. DIAMOND, M.D., et al.,
Intervening Defendants-Appellants/
Cross-Appellees.

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,
Plaintiffs-Appellees,
v.
RICHARD M. DALEY, et al.,
Defendants-Appellants,
EUGENE F. DIAMOND, MD., et al.,
Intervening Defendants-Appellants

Appeals from the United States District
Court for the Northern District of
Illinios, Eastern Division

Nos. 79-C-4541, 79-C-4548
Charles Kocoras, Judge.

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* William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, REVERSED in part, with direction, in accordance with the opinion of this Court filed this date. Costs on appeal are to be assesed equally against defendants-appellants Richard M. Daley, et al. and intervening defendants-appellants Eugene F. Diamond, M.D., et al.

IN THE
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EUGENE F. DIAMOND, M.D., et al.,
Intervening Defendants-Appellants

Nos. 83-3175 to 83-3177 and 83-3253

NOTICE OF APPEAL

Notice is hereby given that Intervening Defendants-Appellants Eugene F.

Diamond, M.D., et al., appeal to the United States Supreme Court pursuant to 28 U.S.C. §1254(2) from those portions of the final judgment entered on November 30, 1984, in this action, declaring unconstitutional and permanently enjoining §§2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law of 1975, as amended.

EUGENE F. DIAMOND, M.D.
JASPER F. WILLIAMS, M.D.

/s/

Maura K. Quinlan
One of Intervening
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Americans United for Life
Legal Defense Fund
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CERTIFICATE OF SERVICE

I, Maura K. Quinlan, certify that a copy of Intervening Defendants-Appellants Notice of Appeal was served upon each of the following persons:

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by depositing a properly addressed copy with sufficient first class postage affixed in the U. S. mail on February 28, 1985, at 5:00 p.m.

/s/
Maura K. Quinlan

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE CONSTITUTION

U.S. Const. amend. XIV, §1 (in pertinent part):

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ADDITIONAL STATUTORY AND REGULATORY PROVISIONS

Ill. Rev. Stat. ch. 38, ¶81-22, §2(10):

> "Abortifacient" means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.

Ill. Rev. Stat. ch. 38, ¶81-26(1), §6(1):

> No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such

person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a viable fetus or infant results from such failure.

Ill. H.B. 1399, §6(1) (enacted June 30, 1984):

(a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally knowingly, or recklessly violates the provisions of Section

6(1)(a) commits a Class 3 felony.

Ill. Rev. Stat. ch. 38, ¶81-26(4), §6(4):

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life or health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him a possibility known to him of sustained survival of the fetus apart from the body of the mother with or without artificial support. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus before or after birth is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure.

Ill. H.B. 1399, §6(4) (enacted June 30, 1984):

> (a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before

him, there is a reasonable possibility of sustained survival of the fetus outside the womb, with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(4)(a) commits a Class 3 felony.

Ill. Rev. Stat. ch. 38, ¶81-31, §11(d):

Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for which it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

Ill. Rev. Stat. ch. 38, ¶81-22(9) (1983):

> "Fetus" and "unborn child" each mean a human being from fertilization until birth.

Ill. Rev. Stat. ch. 38, ¶81-22(6) (1984 Supp.):

> "Fetus" and "unborn child" each mean an individual organism of the species homo sapiens from fertilization until live birth.

Ill. Rev. Stat. ch. 38, ¶81-26(5) (1983):

> Nothing in Section 6 requires a physician to employ a method of abortion which, in the medical judgment of the physician performing the abortion based on the particular facts of the case before him, would increase medical risk to the mother.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Allan G. Charles, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4541
BERNARD CAREY, et al.,	)	
Defendants.	)	
THE HOPE CLINIC FOR WOMEN, Ltd., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4548
TYRONE C. FAHNER, et al.,	)	Judge Charles P. Kocoras
Defendants.	)	

AFFIDAVIT OF DIANA SHARK

I, Dianna Shark, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am 33 years old and believe in family planning.

2. I also believe that there is a big difference between drugs or devices which act to prevent conception/fertilization and those which terminate a pregnancy after that point in time. I say this because I believe that a human being exists from the point of conception forward. I believe that any drug or device which prevents childbirth after the point of conception acts as an abortifacient and ends the life of a human being.

3. I, therefore, would not want to use an abortifacient. Information concerning the abortifacient character of any prescription should be required so that I can exercise my right to choose between abortifacients and other methods of family planning.

Respectfully submitted,

/s/
Dianna Shark

[Notarized 6/13/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Allan G. Charles, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4541
BERNARD CAREY, et al.,	)	
Defendants.	)	
THE HOPE CLINIC FOR WOMEN, Ltd., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4548
TYRONE C. FAHNER, et al.,	)	Judge Charles P. Kocoras
Defendants.	)	

AFFIDAVIT OF MARY CHRISTINE GASPAR

I, Mary Christine Gaspar, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am of childbearing age.

2. I am of the opinion that an

individual human being exists from conception until death. I also believe that it is morally wrong to end the life of an innocent human being no matter how young it is.

3. I do not, however, think that family planning through the use of contraceptives is inappropriate since it does not terminate the life of a human being. It merely prevents that life from beginning.

4. Because of my beliefs and my desire to plan my family in a manner which would not conflict with those beliefs, I feel that it is necessary to know the effect of drugs or instruments which are commonly used for family planning. This would enable me to choose between those which act only as contraceptives and those which act as abortifacients.

5. Therefore, I think that it is imperative that anyone prescribing an abortifacient inform me of its abortifacient nature.

Respectfully submitted,

/s/
Mary Christine Gaspar

[Notarized 6/13/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Allan G. Charles, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4541
BERNARD CAREY, et al.,	)	
Defendants.	)	
THE HOPE CLINIC FOR WOMEN, Ltd., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4548
TYRONE C. FAHNER, et al.,	)	Judge Charles P. Kocoras
Defendants.	)	

AFFIDAVIT OF DEBRA ELROD EVANS

I, Debra Elrod Evans, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am 29 years old.

2. I am not opposed to taking con-

traceptives as a means of family planning.

3. Because I believe that life begins at conception and that it is morally wrong to end a life, I would not knowingly use any instrument or drug which is known to cause the death of a fertilized egg--either through direct action on that egg or through prevention of its implantation.

4. I would expect any person prescribing an instrument or drug which acts to cause the death of a fertilized egg to inform me of its abortifacient nature. Without such information, I would not be able to exercise my choice of family planning according to my beliefs as set forth above.

Respectfully submitted,

/s/

Debra Elrod Evans

[Notarized 6/13/82]

No. 84-1379 (2)

Office - Supreme Court, U.S.
FILED
APR 4 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EUGENE F. DIAMOND, M.D., and
JASPER F. WILLIAMS, M.D.,

Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,

Appellees.

EUGENE F. DIAMOND, M.D., and
JASPER F. WILLIAMS, M.D.,

Appellants,

vs.

THE HOPE CLINIC FOR WOMEN, LTD., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Illinois legislature's revision of a criminal abortion statute after entry of the District Court's judgment mooted intervening defendants' appeal from the District Court decision finding section 6(4) of the Illinois Abortion Law unconstitutional?

2. Whether the Illinois legislature's amendment of a criminal abortion statute after entry of the District Court's judgment mooted plaintiff-cross-appellants' appeal from the District Court's decision finding section 6(1) of the Illinois Abortion Law constitutional?

3. Can Illinois constitutionally subject physicians to criminal prosecution for failing, during pre-viability abortions, to use the abortion procedure which is least damaging to the fetus?

4. Can Illinois constitutionally subject a woman's attending physician and his assistants to criminal prosecution for failing to use the abortion procedure which is least damaging to a fetus "known to be viable," when the statute does not specify that the attending physician's determination of viability controls?

5. Whether the Illinois criminal abortion statute can constitutionally require physicians to inform all birth control patients for whom an abortifacient type of birth control is prescribed that they are prescribing abortifacients which cause fetal death?

PARTIES

The intervening defendants below, Eugene F. Diamond, M.D., and Jasper F. Williams, M.D., are appellants herein. Neil F. Hartigan, Illinois Attorney General, and Richard M. Daley, Cook County State's Attorney, were party-defendants to the proceeding in the Court of Appeals for the Seventh Circuit, but neither Hartigan nor Daley has appealed to this Court by filing a notice of appeal, or joined in the intervening defendants-appellants' Jurisdictional Statement.

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The unreported opinion of the District Court for the Northern District of Illinois referred to in intervening defendants-appellants' Jurisdictional Statement (p. 4), may be cited as *Charles v. Carey,* No. 79 C 4541 (N.D. Ill. November 16, 1979), and is reprinted in the Appendix of the Appellees.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EUGENE F. DIAMOND, M.D., and
JASPER F. WILLIAMS, M.D.,

Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,

Appellees.

EUGENE F. DIAMOND, M.D., and
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Appellants,

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THE HOPE CLINIC FOR WOMEN, LTD., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

The appellees, ALLAN G. CHARLES, M.D., MARVIN ROSNER, M.D., DAVID ZBARAZ, M.D., and MARTIN MOTEW, M.D., move the Court to dismiss the appeal or, in the alternative, affirm the judgment of the Court of Appeals, for the following reasons:

1. ORAL ARGUMENT OR FULL REVIEW OF THE JUDGMENT BELOW IS NOT JUSTIFIED BECAUSE THE CIRCUITS ARE NOT IN CONFLICT ON THE QUESTIONS PRESENTED BY APPELLANTS AND THERE IS NO PRESSING NEED TO REEVALUATE *ROE v. WADE*, 410 U.S. 113 (1973), AND ITS PROGENY IN LIGHT OF THIS COURT'S RECENT DECISIONS IN *CITY OF AKRON v. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC.*, 462 U.S. 416 (1983), *AND PLANNED PARENTHOOD ASS'N OF KANSAS CITY, INC. v. ASHCROFT*, 462 U.S. ___ (1983).

2. INTERVENING DEFENDANTS-APPELLANTS PRESENT NO SUBSTANTIAL FEDERAL QUESTIONS WHICH WOULD REQUIRE REVIEW BY THIS COURT.

3. THE JUDGMENT BELOW, FINDING UNCONSTITUTIONAL SECTIONS 6(1), 6(4), 2(10) AND 11(d) OF THE ILLINOIS ABORTION LAW OF 1975, IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND SHOULD BE AFFIRMED.

STATEMENT OF THE CASE

The Court should be aware of the following facts not presented in the intervening defendants-appellants' Statement of the Case:

The State of Illinois has a long history of enacting unconstitutional abortion laws.

Eleven provisions of the Illinois Abortion Law of 1975 were found unconstitutional in *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978) (three judge court), *aff'd sub nom., Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) ["*Wynn I*"].

The Illinois Abortion Parental Consent Act of 1977 was found unconstitutional in *Wynn v. Scott*, 448 F. Supp. 997 (N.D. Ill. 1978), *aff'd sub nom., Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978) and *Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) ["*Wynn II*"].

Fifteen provisions, or portions thereof, of Illinois Senate Bill 47, the 1979 amendments to the Illinois Abortion Law of 1975 (effective Oct. 30, 1979), including sections 6(1) and 6(4), were held unconstitutional by the District Court for the Northern District of Illinois and preliminarily enjoined on November 16, 1979. *Charles v. Carey*, No. 79 C 4541 (N.D. Ill. Nov. 16, 1979). On appeal, the Seventh Circuit enjoined two additional provisions, sections 2(10) and 11(d). *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980).

During the pendency of this litigation, the General Assembly enacted Illinois House Bill 666 (effective Sept. 17, 1983). HB 666 amended the statutory definition of viability and section 6(4) in the Illinois Abortion Law of 1975. The District Court, on cross-motions for summary judgment, held that even with the amendments, section 6(4) remained unconstitutional. Section 6(1) was found constitutional. *Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983).

Illinois House Bill 1399, which further amended the Illinois Abortion Law of 1975, including sections 6(1) and 6(4), was enacted on June 30, 1984. Governor James Thompson vetoed this bill on constitutional grounds but the General Assembly overrode his veto. At the time HB 1399 was enacted, defendants' appeal from the District Court's decision enjoining sections 6(4), 2(10), and 11(d) had been fully briefed, although oral argument in the Court of Appeals had not been scheduled.*

A class of physicians immediately challenged HB 1399 and a temporary restraining order was entered on July 1, 1984, in *Keith v. Daley,* No. 84 C 5602 (N.D. Ill. July 1, 1984). That restraining order remains in effect.

The Seventh Circuit held that the amendments in HB 1399 did not moot the parties' appeals from the District Court's decision finding section 6(1) constitutional and section 6(4) unconstitutional. The court affirmed the District Court's decision finding sections 6(4), 2(10), and 11(d) unconstitutional, and reversed the District Court's decision finding section 6(1) constitutional. *Charles v. Daley,* 749 F.2d 452 (7th Cir. 1984).

Although required by Supreme Court Rule 15(g), the intervening defendants-appellants' Statement of the Case does not state that they raised the question of mootness (Appellants' Question Presented No. 2) for the first time during oral argument before the Seventh Circuit. Nor does their Statement reveal that at no stage of the proceedings below did they raise the claim that any state court or enforcement agency or any state official had ever proffered a limiting construction of section 6(1). Rather, they raise the "limiting construction" issue (Appellants' Question Presented No. 3) for the first time on appeal to this Court.

---

* Plaintiffs cross-appealed the District Court's decision not to enjoin section 6(1).

REASONS WHY THE APPEAL SHOULD BE DISMISSED OR THE JUDGMENT BELOW AFFIRMED.

I. ORAL ARGUMENT OR FULL REVIEW OF THE JUDGMENT BELOW IS NOT JUSTIFIED BECAUSE THE CIRCUITS ARE NOT IN CONFLICT ON THE QUESTIONS PRESENTED BY THE INTERVENING DEFENDANTS-APPELLANTS AND THERE IS NO PRESSING NEED TO REEVALUATE *ROE v. WADE*, 401 U.S. 113(1973), AND ITS PROGENY IN LIGHT OF THIS COURT'S RECENT DECISIONS IN *CITY OF AKRON v. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC.*, 462 U.S. 416 (1983), AND *PLANNED PARENTHOOD ASS'N OF KANSAS CITY, INC., v. ASHCROFT*, 462 U.S. ____ (1983).

In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, ____, 103 S.Ct. 2481, 2487 (1983), this Court unequivocably reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973), which held that a woman has a constitutional right to decide whether to terminate her pregnancy. *See also Planned Parenthood Ass'n of Kansas City, Inc. v. Ashcroft*, 462 U.S. ____, 103 S.Ct. 2517 (1983). Consequently, there is no pressing need to reevaluate *Roe v. Wade* and its progeny.

Moreover, the United States Courts of Appeals are not in conflict on the questions presented by the intervening defendants-appellants. Thus, one of the most traditional grounds for the exercise of Supreme Court jurisdiction, the resolution of conflicts among the circuits to assure uniformity of federal law, is not present.

II. INTERVENING DEFENDANTS-APPELLANTS PRESENT NO SUBSTANTIAL FEDERAL QUESTIONS WHICH WOULD REQUIRE REVIEW BY THIS COURT.

As discussed more fully *infra*, Part III, the questions presented by the intervening defendants-appellants have al-

ready been answered by this Court in earlier decisions regarding mootness, criminal regulation of pre-viability abortions, the attending physician's medical judgment, and a State's adoption of one theory of when life begins. Therefore, this appeal presents no substantial federal questions which require review by this Court.

III. THE JUDGMENT BELOW, FINDING UNCONSTITUTIONAL SECTIONS 6(1), 6(4), 2(10) AND 11(d) OF THE ILLINOIS ABORTION LAW, IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND SHOULD BE AFFIRMED.

A. A LIVE CASE OR CONTROVERSY CONTINUES THROUGHOUT THIS LITIGATION; THE AMENDMENT OF THE CHALLENGED STATUTE MERELY CONSTITUTES A VOLUNTARY, NON-BINDING, CESSATION OF IMPERMISSIBLE CONDUCT.

It is well established that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("*Mesquite*"). Such an abandonment of challenged conduct is a "matter relating to the *exercise* rather than the existence of judicial power." *Id.* (Emphasis added.) Relying upon *Mesquite*, the Court of Appeals determined that intervening legislation did not moot the case pending before it. The Seventh Circuit's decision to exercise jurisdiction does not present an issue for review by this Court.

On June 30, 1984, after this case was briefed but before oral argument was heard by the Court of Appeals, the Illinois General Assembly enacted House Bill 1399 ("HB 1399"). This legislation was the fourth amendment to the Illinois Abortion Law of 1975, and included two of the sections challenged in the

pending appeal, section 6(1) and section 6(4). During oral argument, on September 19, 1984, intervening defendants-appellants argued for the first time that HB 1399 rendered moot the appeals of sections 6(1) and 6(4).[1] However, intervening defendants-appellants did not move to dismiss their appeal on section 6(4) or withdraw their arguments that section 6(4) and section 6(1) did not contravene the Constitution. At the suggestion of appellees' counsel, the Court of Appeals directed the parties to file supplemental briefs on mootness. After full briefing and consideration of this issue, the Court of Appeals held that HB 1399 did not moot the appeal of either section 6(1) or section 6(4). *Charles v. Daley*, 749 F.2d 452, 457-58 (7th Cir. 1984).

The defendant alleging mootness carries a heavy burden of persuasion. *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). Mootness results when, during the pendency of a lawsuit, events occur which make it impossible for a court to render a judgment affecting the rights of the litigants. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1976). When the supervening event is a voluntary cessation by defendant of the challenged conduct, the test for mootness is particularly stringent because without the compulsion provided by a binding judgment, "[t]he defendant is free to return to his old ways" and thus avoid an adjudication of the legality of his conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). In cases involving voluntary cessation of illegal conduct, mootness will be found only when "it can be said with assurance" that (1) no reasonable expectation exists that the violation will recur; *and* (2) the effects of the alleged violation have been

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[1] Sections 6(1) and 6(4), prior to amendment by HB 1399, are reproduced in the intervening defendants-appellants' Appendix at pp. 56-57 and 58, respectively. Sections 6(1) and 6(4), as they appear after amendment by HB 1399, are reproduced at 57-58 and 58-59, respectively.

completely and irrevocably eradicated. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). *See also Mesquite*, 455 U.S. at 283 n.10. As recognized by the Court of Appeals, intervening defendants-appellants established neither criterion with respect to either section 6(4) or section 6(1).

1. The Appeal With Respect To Section 6(4) Is Not Moot.

a. The Latest Amendments To Section 6(4) Evidence A Continuing Violation Of The Constitution.

Intervening defendants-appellants cannot evade the first prong of the *Davis/Mesquite* test for mootness. The text of the amended section 6(4) retains the very standard held unconstitutional by both the Court of Appeals and the District Court. The repetition of that unconstitutional standard is overt evidence of a recurring violation of the Constitution and unequivocally demonstrates that it is unreasonable to expect that the violation will not recur. An historical review of the Illinois Abortion Law of 1975, as amended, demonstrates consistent attempts by the General Assembly to evade the dictates of *Roe v. Wade*, 410 U.S. 113 (1973), by enacting anti-abortion legislation and then superficially amending that legislation whenever it is subjected to constitutional attack.[2]

This Court has warned of a special need to "beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). That wariness is particularly appropriate with respect to section 6(4) of the Illinois Abortion Law which has been amended during the pendency of this litigation not only by House Bill 1399 in 1984, but also in 1983 by House Bill 666.

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[2] *See* cases cited in Statement of the Case, *supra*.

Each amendment was initiated only after an adverse ruling in the District Court.

It is both the timing and the nature of the amendments to section 6(4) that emphasize the parallel between the instant situation and that posed in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). In *Mesquite*, the City of Mesquite, Texas ("City"), enacted a licensing ordinance regulating coin-operated amusement centers. The ordinance barred licensing an applicant who had any "connection with criminal elements." 455 U.S. at 287 & n.2. Aladdin's Castle, Inc. ("Aladdin") was denied a license because it was found to be "connected with criminal elements."

After a state court held that the term "connected with criminal elements" was unconstitutionally vague, the City enacted a new ordinance defining "connected with criminal elements." Again denied a license, Aladdin filed for injunctive relief in the United States District Court. The District Court held that the phrase "connected with criminal elements," even as defined, was unconstitutionally vague. 455 U.S. at 287 & n.2. The Court of Appeals for the Fifth Circuit affirmed. However, during that appeal the City had amended the ordinance by eliminating the objectionable phrase "connected with criminal elements." 455 U.S. at 287.

On further appeal, this Court rejected the City's contention that the amendment automatically made the case moot. If voluntary cessation of a challenged practice mooted a case, this Court observed, nothing would prevent a defendant from returning to the same unconstitutional practices. 455 U.S. at 288.

An identical risk of renewed recalcitrant conduct by defendants is present here. Relying on *Mesquite*, the Court of

Appeals rejected intervening defendants-appellants' argument that the appeal was moot, observing:

> Like the defendant City in [Mesquite], the State of Illinois could re-enact S.B. 47's version of section 6(4) if this court dismissed plaintiffs' challenge to that section. Indeed, the very number of amendments made to the challenged statute in the last several years persuades this court that such a result would not be unlikely.

Charles v. Daley, 749 F.2d at 458.[3] Thus, intervening defendants-appellants' failure to establish the first prong of the *Mesquite/Davis* standard is sufficient to defeat their mootness argument.

b. The Unconstitutional Effects Of The Old Section 6(4) Are Not Eradicated.

Intervening defendants-appellants also fail to comply with the second requirement of the *Mesquite/Davis* test. The newest amendments in HB 1399 neither correct the constitutional inadequacies of section 6(4) nor eradicate its harmful chilling effects. Both the Court of Appeals and the District Court held that the old section 6(4) was flawed because the State, by requiring physicians to act on behalf of fetuses displaying a "possibility of survival," unconstitutionally attempted to regulate the abortion process, on behalf of the fetus, prior to viability. By merely inserting the word "reasonable" before "possibility," the new section 6(4) continues to impose criminal liability on physicians who fail to act on behalf of a pre-viable fetus with only a "possibility of survival" outside the womb. Section 6(4) thus continues to contravene the prior holdings of this Court barring regulation of pre-viability abortions unless that regulation is narrowly structured to protect maternal

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[3] The Court of Appeals was intimately familiar with the number of amendments and consequent challenges to the Illinois Abortion Law of 1975. Since first being enacted, various amended versions of this law have been before the Court of Appeals at least four times. *See* Appellees' Statement of the Case, *supra.*

health. *See, e.g., Colautti v. Franklin,* 439 U.S. 379 (1979); *Planned Parenthood of Central Missouri v. Danforth,* 439 U.S. 52 (1976); *Roe v. Wade,* 410 U.S. 113 (1973).

Indeed, intervening defendants-appellants admit that a live case and controversy remains with respect to section 6(4). (Jurisdictional Statement at 43.) Intervening defendants-appellants argue that both the new and old section 6(4) constitutionally impose a pre-viability standard of care upon physicians. (Jurisdictional Statement at 43.) What intervening defendants-appellants fail to recognize is that the General Assembly's reenactment of the same "possibility of survival" standard that had been rejected by both the Court of Appeals and the District Court, is not only evidence of a recurring violation of the Constitution, but is also a clear failure to eradicate the harmful effects of the old statute. Thus, under *Mesquite,* HB 1399 did not moot this appeal. The Court of Appeals appropriately exercised its jurisdiction and decided the merits of the appeal.[4]

HB 1399 neither repealed the old section 6(4) nor corrected its constitutional flaws. Thus, if the new section 6(4),

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[4] It is axiomatic that a party remains master of his own case. However, despite their claim that HB 1399 rendered this case moot, intervening defendants never asked the Seventh Circuit to dismiss their appeal of section 6(4). Instead, intervening defendants continued to urge the Seventh Circuit to reverse the District Court's injunction of that section. Intervening defendants' continued advocacy is significant. In *Walling v. Helmerick & Payne, Inc.,* 323 U.S. 37, 43 (1944), the Court declined to treat as moot an action under the Fair Labor Standards Act even after the defendant employer voluntarily had changed its method of paying employees. This Court observed that defendant "has consistently urged the validity of the [old] plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made." As recognized by the Court of Appeals, defendants here would have the same freedom to resume their old ways absent a binding judicial decision.

currently under restraining order, is permanently enjoined, the old section 6(4) is once again available to law enforcement officials. Because the statute of limitations for Class 3 felonies has not run, Ill.Rev.Stat. 1983, Ch. 38 ¶ 3-5(b), plaintiff-physicians would be subject to a risk of prosecution under the old standard. Thus, HB 1399 did not eliminate the harmful effects of the old section 6(4).

Intervening defendants-appellants concede that the amended section 6(4) adopts a pre-viability standard almost identical to that struck down by the Court of Appeals and the District Court. This concession emphasizes not only the intervening defendants-appellants' failure to satisfy either prong of the *Mesquite/Davis* test, but also the continuing live controversy with respect to section 6(4). The Court of Appeals' exercise of jurisdiction with respect to section 6(4) does not present a substantial federal question deserving of review by this Court.

2. Section 6(1) Presents A Live Case Or Controversy.

a. Plaintiff-Physicians Remain At Risk Under The Old Section 6(1).

Section 6(1), no less than section 6(4), has been subject to continuous amendment by the General Assembly in response to successful constitutional challenges. Intervening defendants-appellants thus cannot satisfy the first prong of the *Mesquite/Davis* test. However, the live nature of the constitutional controversy surrounding section 6(1) provides an additional and more compelling reason for the Court of Appeals to reach the merits. HB 1399 did not repeal old section 6(1). Old section 6(1) poses continuing consequences—the risk of prosecution—even after its amendment. These consesquences rebut intervening defendants-appellants' contention that HB 1399 rendered moot plaintiff-physicians' appeal before the Seventh Circuit.

Old section 6(1) remained in effect from October 14, 1983, until June 30, 1984, the day HB 1399 was enacted. Violation of the old section 6(1) was a Class 2 felony if the death of a fetus occurred as a result of a post-viability abortion. Ill.Rev.Stat. 1983, Ch. 38, ¶ 81-26(1). The relevant statute of limitations, Ill.Rev.Stat. 1983, Ch. 38, ¶ 3-5(b), allows the State a period of three years within which to commence prosecution. As noted by the Court of Appeals, this risk of prosecution was "insufficiently speculative" to render moot the appeal on section 6(1). *Charles v. Daley,* 749 F.2d at 457.

B. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT CORRECTLY FOUND THAT SECTION 6(1) OF THE ILLINOIS ABORTION LAW IS UNCONSTITUTIONALLY VAGUE AND ENCROACHES UPON THE ATTENDING PHYSICIAN'S MEDICAL JUDGMENT.

The Court of Appeals for the Seventh Circuit, following Supreme Court precedent in *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983); *Planned Parenthood of Central Missouri, v. Danforth,* 428 U.S. 52 (1976); *Colautti v. Franklin,* 439 U.S. 379 (1979); and *Franklin v. Fitzpatrick,* 428 U.S. 901 (1976), correctly found section 6(1) unconstitutional.

Section 6(1) of the Illinois Abortion Law of 1975, as amended by SB 47, provides:

> No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable, before or after birth, commits a Class 2 felony if the death of a viable fetus or infant results from such failure.

The Court of Appeals noted that while section 6(1) applies when the fetus is "known to be viable," it does not specify who is to make the viability determination. The consequence of this vagueness, stated the Court of Appeals, is that:

> the section could make criminal an assistant's failure to use the requisite care in aborting a fetus which the assistant, but not the physician, believes in [sic] nonviable. In addition, the section could make criminal a physician's failure to observe the required standard of care in situations where some other physician, but not the treating physician, believes that the fetus is viable.

Charles v. Daley, 749 F.2d at 459.

This Court has held that "the determination of whether a particular fetus is viable is, and must be, a matter for the responsible attending physician," *Planned Parenthood of Central Missouri, v. Danforth,* 428 U.S. at 64, and that the State may not interfere with the attending physician's medical judgment in determining viability. *Colautti v. Franklin,* 439 U.S. at 395-96. Relying on those decisions, the Court of Appeals held that "[b]ecause section 6(1) does not specify that the attending physician's viability determination alone shall govern, section 6(1) improperly encroaches on the attending physician's medical judgment in treating his patient." 749 F.2d at 459.

The intervening defendants-appellants concede that "the determination of viability [must be] left to 'the attending physician on the particular facts of the case before him,' " *citing Colautti v. Franklin,* 439 U.S. 379, 388 (1979), and admit that "[s]ection 6(1) did not conclusively specify that the attending physician's determination of viability controls." (Jurisdictional Statement at 47.) Nevertheless, intervening defendants-appellants argue that the Court of Appeals erred in failing to construe section 6(1) as applying only when the fetus is "known [by the attending physician] to be viable." This is the only argument made by intervening defendants-appellants with regard to section 6(1).

In support of their argument, intervening defendants-appellants cite *Kolender v. Lawson,* 461 U.S. 352, 355 (1983), for the proposition that "[i]n evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a *state court* or *enforcement agency* has proffered." (Jurisdictional Statement at 46.) (Emphasis added.) The *Kolender* case involved a California criminal statute that required persons who loiter or wander on the streets to provide "credible and reliable identification" and to account for their presence when requested by a peace officer. The California Court of Appeal, nine years earlier, had construed the term "credible and reliable identification" to mean "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." 461 U.S. at 358-59. Citing *Colautti,* 439 U.S. at 394-401, this Court noted that when a statute imposes criminal penalties, it must be drafted with more clarity and precision than a non-criminal statute. Applying a heightened standard of scrutiny, this Court held that the statute, on its face and as construed by the California Court of Appeal, was unconstitutionally vague because it contained no standard for determining what a suspect has to do in order to satisfy the requirement to provide "credible and reliable identification." 461 U.S. at 358-59.

In this case, no limiting construction has been proffered by a state court or enforcement agency. Indeed, the Attorney General, who is charged with defending the statute's constitutionality, and the State's Attorney, who is charged with enforcing the statute, have not appealed from the Seventh Circuit's decision finding these sections of the Illinois Abortion Law unconstitutional. Intervening defendants-appellants apparently base their "limiting construction" argument on the fact that Hartigan and Daley adopted intervening defendants' Seventh Circuit reply brief, which contains intervening defendants' own argument that section 6(1) should be construed to

avoid unconstitutionality. (Jurisdictional Statement at 48.) However, that reply brief does not contain any reference to an authoritative construction offered by either Hartigan or Daley. Thus, the Court of Appeals clearly cannot be faulted for failing to consider a "limiting construction" never presented to the Court.

Intervening defendants-appellants ignore two other substantial reasons given by the Court of Appeals for finding section 6(1) unconstitutional.

The Court of Appeals stated that the State "must precisely tailor its standard of care [in section 6(1)] to the particular State interests at stake so that its statute precisely notifies physicians and their assistants as to what conduct by them the State purports to condemn." *Charles v. Daley,* 749 F.2d at 460. When confronted with a similarly ambiguous standard of care requirement in *Colautti v. Franklin,* 439 U.S. 379 (1979), this Court held that "where conflicting duties [to the patient and to the fetus] of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." *Id.* at 400-01. Relying on this Court's decision in *Colautti,* the Court of Appeals properly concluded that "the State must proceed with greater precision before it may subject a physician, or his assistant, to criminal sanction [under section 6(1)]." *Charles v. Daley,* 749 F.2d at 460.

The third reason given by the Court of Appeals for finding section 6(1) unconstitutional is that it unconstitutionally burdens the exercise of a woman's fundamental right to abortion by placing obstacles in the form of criminal sanctions in the path of the physician upon whom she is entitled to rely for advice. The Court of Appeals noted that "[w]here a vague statute 'abuts upon' the exercise of fundamental rights, the statute 'operates to inhibit the exercise of freedoms,'" *citing*

Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 571 (E.D. Pa. 1975), *aff'd sub nom. Franklin v. Fitzpatrick,* 428 U.S. 901 (1976). *Charles v. Daley,* 749 F.2d at 460.

Section 6(1) is unconstitutionally vague because it threatens criminal prosecutions against physicians and their assistants without precisely delineating the prohibited conduct. Thus, the Court of Appeals reasoned, section 6(1) unconstitutionally "chill[s] the exercise of a physician's best medical judgment in consulting with his patients about abortion." *Id.* That chill on the exercise of the physician's best medical judgment "abuts upon a woman's fundamental right to consult her doctor about abortion and to receive her doctor's unimpeded medical judgment, [and] threatens to chill the exercise of her freedom." *Id.*

In *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, ____, 103 S.Ct. 2481, 2491 (1983), this Court reiterated that "the full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment,' " *citing Doe v. Bolton,* 410 U.S. 179, 192 (1973), and *Whalen v. Roe,* 429 U.S. 589, 604-05 n.33 (1977). Thus, the judgment of the Court of Appeals that section 6(1) unconstitutionally inhibits the exercise of a woman's fundamental right to abortion is consistent with the decisions of this Court.

For all of the above reasons, the judgment of the Court of Appeals as to section 6(1) should be affirmed.

C. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT WAS CORRECT IN FINDING THAT SECTION 6(4) OF THE ILLINOIS ABORTION LAW IS NOT SUPPORTED BY A COMPELLING STATE INTEREST IN FETAL LIFE OR MATERNAL HEALTH AND IS THEREFORE UNCONSTITUTIONAL.

Like section 6(1), section 6(4) imposes a standard of care upon physicians and their assistants who perform abortions,

and enforces that standard of care with the threat of felony criminal prosecution. Unlike section 6(1), however, section 6(4) regulates the abortion of the pre-viable fetus.

Section 6(4) of the Illinois Abortion Law of 1975, as amended by SB 47 and HB 666, provides:

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of the mother, with or without artificial support. Any physician or person assisting in such pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such a failure.

This Court has stated clearly that prior to viability, "a State . . . may not impose direct obstacles — such as criminal penalties — to further its interest in the potential life of the fetus." *Colautti v. Franklin,* 439 U.S. 379, 386-87 n. 7 (1979). *Cf. Planned Parenthood of Central Missouri, v. Danforth,* 428 U.S. 52, 81-84 (1976). Intervening defendants-appellants admit that section 6(4) "operates prior to 'legal' viability; a stage in pregnancy when the State's interest in protecting legal life has not yet become compelling." (Jurisdictional Statement at 52.)

The Court of Appeals followed the *Colautti* decision and found section 6(4) unconstitutional. The Court of Appeals recognized that doctors' refusal to perform certain previability abortions, because of the risk of criminal sanctions under section 6(4), "significantly burden[ed] a woman's right to terminate her pregnancy." *Charles v. Daley,* 749 F.2d at 461.

The State may justify a restriction of the right to abortion if it has a compelling interest in preserving fetal life, *Roe v. Wade,* 410 U.S. 113, 163 (1973), or in protecting maternal health, *Akron,* 462 U.S. at ____, 103 S.Ct. at 2492. Neither of the above interests justifies section 6(4). First, the Court of Appeals found that section 6(4) does not seek to protect the health of the mother and intervening defendants-appellants do not argue otherwise. *Charles v. Daley,* 749 F.2d at 461. As for the second possible justification, the Court of Appeals stated:

> [T]he State's interest in preserving fetal life, becomes compelling only at the stage of viability. *Roe v. Wade,* 410 U.S. at 163, 93 S.Ct. at 731. As a consequence, the State's interest in preserving fetal life cannot justify section 6(4) because section 6(4) applies to certain pre-viability abortions. . . . Because the State has advanced no other compelling interest which could justify section 6(4)'s restriction on a woman's freedom to choose an abortion, this court must find that section 6(4) unconstitutionally infringes on the woman's fundamental right. Section 6(4) is therefore invalid.

Id. The Court of Appeals' analysis is correct and consistent with this Court's *Colautti* decision.

Intervening defendants-appellants' argument that "the requirements of [section] 6(4) neither coerce nor significantly encourage any physician to refuse to perform abortions [on pre-viable fetuses]" ignores both the lack of a compelling state interest in fetal life prior to viability and section 6(4)'s criminal penalties. Intervening defendants-appellants simply, and without justification, invite this Court to overrule its decisions in *Akron, Colautti, Danforth,* and *Roe v. Wade.*

For the reasons stated, the judgment of the Court of Appeals as to section 6(4) should be affirmed.

D. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT WAS CORRECT IN FINDING THAT SECTIONS 2(10) AND 11(d) OF THE ILLINOIS ABORTION LAW UNCONSTITUTIONALLY INTRUDE ON THE MEDICAL DISCRETION OF THE ATTENDING PHYSICIAN AND FORCE THE PHYSICIAN TO FOIST UPON THE PATIENT THE STATE'S VIEW THAT LIFE BEGINS AT CONCEPTION.

Contrary to the assertion of intervening defendants-appellants (Jurisdictional Statement at 14), the judgment of the Court of Appeals as to sections 2(10) and 11(d) is *not* "in direct conflict with the decisions of this Court in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 67 (1976), and *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, ____, 103 S.Ct. 2481, 2502 (1983)." Rather, the decision below is in perfect harmony with those decisions and must be affirmed.

Sections 2(10) and 11(d) of the Illinois Abortion Law of 1975, as amended by SB 47, provide:

> 2(10) "Abortifacient" means any instrument, medicine, drug or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.
>
> 11(d) Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

"Fetus" is defined to mean "a human being from fertilization until birth," and "human being" is defined to mean "the individual from fertilization until death." Ill. Rev. Stat. 1983, Ch. 38 ¶ 81-22(8) and ¶ 81-22(9) (Sections 2(8) and 2(9) of the Illinois Abortion Law of 1975).

The Court of Appeals noted that in *Danforth,* this Court upheld a general requirement that physicians obtain informed consent before a woman undergoes an abortion by informing patients as to "what will be done and as to its consequences." 428 U.S. at 67 n.8. In *Danforth,* this Court "cautioned . . . that a more detailed requirement of informed consent could confine the attending doctor in an undesired and uncomfortable straitjacket in the practice of his profession." *Charles v. Daley,* 749 F.2d at 461. The effect of sections 2(10) and 11(d) is to put physicians in just such a "straitjacket."

In *Akron,* this Court analyzed an "informed consent" abortion statute that required the attending physician to provide an inflexible list of specific information "to each woman regardless of whether in his judgment the information is relevant to her personal decision," including information that "the unborn child is a human life from the moment of conception." 462 U.S. at ____, 103 S.Ct. at 2499-2501. The Court stated that "[i]t remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, *depending on her particular circumstances*" (emphasis added), and struck down that section of the statute because it went "far beyond merely describing the general subject matter relevant to informed consent." 462 U.S. at ____, 103 S.Ct. at 2500-01.

A second section of the "informed consent" statute required the attending physician to inform the woman "of the particular risks associated with her own pregnancy and the abortion technique to be employed . . . [and] other information *which in his own medical judgment is relevant to her decision* as

to whether to have an abortion or carry her preganancy to term." (Emphasis added.) *Id.* at 2501.

Relying on this Court's decisions in *Danforth* and *Akron*, the Court of Appeals held that section 11(d) intrudes on the medical discretion of the attending physician. *Charles v. Daley*, 749 F.2d at 462. Section 11(d) defines the *precise nature* of the information, *Akron*, 462 U.S. at ____, 103 S.Ct. at 2499, and inflexibly requires that the physician must notify *each woman* that he has prescribed or administered an "abortifacient," "regardless of whether in his judgment the information is relevant to her personal decision." *Akron*, 462 U.S. at ____, 103 S.Ct. at 2499. In the absence of this inflexible requirement, nothing prevents a physician from identifying those forms of birth control which prevent implantation of a fertilized egg for women who object to such forms of birth control on religious or other grounds.

In addition, the Court of Appeals found that the precise nature of the information which section 11(d) requires physicians to provide "impermissibly imposes the State's theory of when life begins upon the physician's patient." *Charles v. Daley*, 749 F.2d at 462. The Court of Appeals reiterated that "the use of the term 'abortifacient' in describing certain birth control methods forces the physician to act as the mouthpiece for the State's theory of life." *Charles v. Daley*, 749 F.2d at 462, *citing Charles v. Carey*, 627 F.2d 789 (7th Cir. 1980). Sections 2(10) and 11(d) incorporate a definition of "fetus" in which the State classifies a "fetus" as synonymous with "unborn child", "each mean[ing] a human being from fertilization until birth." The Court of Appeals properly followed this Court's ruling in *Akron*, 462 U.S. at ____, 103 S.Ct. at 2500, that requiring a physician to inform his patient that "the unborn child is a human life from the moment of conception" is "inconsistent with the Court's holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions." *Charles v. Daley*, 749 F.2d at 462.

Furthermore, "[t]hese sections additionally infringe upon a woman's constitutionally protected right of private decision-making in matters relating to contraception, with no countervailing State compelling interest. *See Carey v. Population Services International,* 431 U.S. at 688-89, 97 S.Ct. at 2017-18." *Charles v. Daley,* 749 F.2d at 462.

Intervening defendants-appellants assert that "[n]othing in § 11(d) requires the physician to describe an abortifacient in any particular manner. He may use whatever language he chooses in describing it." (Jurisdictional Statement at 13-14.) "[Section 11(d)] does [not] in any way require a physician to explain an 'abortifacient' to his patient in the manner set forth in § 2(10)." (*Id.* at 16 n.3.) In reading section 11(d) to incorporate the definition of "abortifacient" provided by the same statute, intervening defendants-appellants argue, "the court disregarded well-settled principles of statutory construction . . .."[5] (Jurisdictional Statement at 20.) At the same time, however, intervening defendants-appellants *rely* on the definition of "abortifacient" in section 2(10) to save section 11(d) from vagueness, "so that . . . doctors will know under what circumstances § 11(d) applies." (Jurisdictional Statement at p. 14 n. 2.) Intervening defendants-appellants also attempt to rely on the definition of "fetus," as amended by HB 1399, to support their argument that sections 2(10) and 11(d) are

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[5] Intervening defendants-appellants have not stated or cited the principles to which they refer, making response to this assertion impossible. Intervening defendants-appellants also assert that the Court of Appeals erred in construing section 11(d) "contrary to the limiting construction of the *agencies* charged with enforcement . . .." (Emphasis added.) Intervening defendants-appellants state in a footnote that "Appellants Daley and Hartigan . . . have repeatedly stated that doctors must only inform the women that they are administering or prescribing an abortifacient and nothing more." (Jurisdictional Statement at 26 and n.8.) Intervening defendants-appellants can cite nothing in the record to support their allegation that Daley and Hartigan ever made such statements.

constitutional. (Jurisdictional Statement at 20-21 n.5.) Clearly, intervening defendants-appellants cannot have it both ways.

The Court of Appeals logically and correctly read section 11(d) in light of the relevant definitions provided in the statute at the time of the District Court's decision. There is no way to logically or reasonably construe section 11(d), in light of sections 2(8), 2(9), and 2(10), as *not* requiring physicians to inform *all* patients, regardless of individual circumstances, that certain methods of birth control "cause" the "death" of an "unborn child" or "human being." Intervening defendants-appellants admit that the term "human" or "human being" [when used in reference to a fertilized egg or fetus] "may have . . . connotations of personhood or membership in society which may be offensive to some . . .." (Jurisdictional Statement at 21.) In effect, intervening defendants-appellants admit that the State is foisting a view of when life begins on persons who do not share the State's view.

Despite intervening defendants-appellants' denial, the State in sections 2(10) and 11(d) is improperly attempting to influence women's constitutionally protected right of private decision-making in matters relating to birth control by requiring physicians to inform all women that certain methods of birth control cause the death of an unborn child or human being. If a gynecologist in Illinois fails to inform his patient that the IUD she has requested will cause the death of an unborn child or human being, he could go to prison under the penalties imposed by sections 2(10) and 11(d). None of the cases cited or arguments made by intervening defendants-appellants support this ridiculous result.

For all of the above reasons, the judgment of the Court of Appeals as to sections 2(10) and 11(d) should be affirmed.

CONCLUSION

This appeal should be dismissed because the intervening defendants-appellants present no substantial questions which require review by this Court. Alternatively, the judgment below should be summarily affirmed because the decision finding sections 6(1), 6(4), 2(10) and 11(d) of the Illinois Abortion Law of 1975 unconstitutional is consistent with the decisions of this Court.

Respectfully submitted,

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Dated: April 1, 1985

APPENDIX

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

ALLAN G. CHARLES, M.D., MARVIN ROSNER, M.D., DAVID ZBARAZ, M.D., and MARTIN MOTEW, M.D., and on behalf of all other similarly situated,
Plaintiffs,

v.

BERNARD CAREY, State's Attorney for the County of Cook, WILLIAM J. SCOTT, Attorney General of the State of Illinois, their agents successors, and all others similarly situated, and BYRON FRANCIS, M.D., Acting Director of Public Health, State of Illinois,
Defendants.

79 C 4541

THE HOPE CLINIC FOR WOMEN, LTD., an Illinois corporation, HECTOR N. ZEVALLOS, M.D., NATIONAL HEALTH CARE SERVICES OF PEORIA, INC., an Illinois corporation, ARTHUR C. WATSON, JR., M.D., and ROBERT C. STEPTOE, M.D.,
Plaintiffs,

v.

WILLIAM J. SCOTT, Attorney General of the State of Illinois, and BERNARD CAREY, State's Attorney of Cook County Illinois,
Defendants.

79 C 4548

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge

This consolidated[1] class action is brought by seven physicians who are engaged in the practice of obstetrics and gynecology and by two Illinois corporations which perform abortion services for women against the Attorney General of the State of Illinois, the State's Attorney of Cook County, Illinois, who is sued in his official capacity and as the representative of a class of all other State's Attorneys in Illinois, and the Acting Director of the Department of Public Health of the State of Illinois.[2] In addition two physicians, one who is engaged in the practice of pediatrics and is the parent of a minor daughter of childbearing age and one who is engaged in the practice of obstetrics and gynecology, and the spouse of a woman of childbearing age have sought and obtained leave to intervene as defendants. This action challenges the constitutionality of the Illinois Abortion Law of 1975, as amended October 30, 1979 (the "1979 Law"), and seeks declaratory and injunctive relief. Plaintiffs allege deprivations of rights secured under the first, fourth, fifth, ninth and fourteenth amendments to the United States Constitution and 42 U.S.C. § 1983 and jurisdiction is predicated upon 28 U.S.C. §§ 1331, 1343, 2201 and 2202. On October 31, 1979 this court entered an order temporarily restraining the implementation and enforcement of the 1979 Law and on November 8, 1979 this court extended the temporary restraining order until November 16, 1979 pending ruling on plaintiffs' motion for a preliminary injunction.[3] For the reasons set forth below, plaintiffs' motion is granted in part and denied in part.

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[1] Two related cases, No. 79 C 4541 and No. 79 C 4548, have been consolidated for the purposes of the motions presently pending before the court. Unless otherwise stated, the issues and the parties are the same in each case.

[2] Defendant, Dr. Byron Francis, the Acting Director of the Illinois Department of Public Health, is named as a defendant only in No. 79 C 4541.

[3] Defendant Bernard Carey, State's Attorney of Cook County, Illinois, has moved for summary judgment and defendants William J. Scott, Attorney General of the State of Illinois and Dr. Byron Francis, the Acting Director of the Illinois Department of Public Health, have moved to dismiss. These pending motions are not ruled on by the court at this time.

Since defendants[4] have raised numerous standing arguments,[5] it is necessary to describe in additional detail who some of the plaintiffs in this action are. Dr. Allan J. Charles, Dr. David Zbaraz and Dr. Martin Motew share their practice with two other obstetricians/gynecologists. Their practice is approximately fifty percent obstetrics, of which approximately three percent or a minimum of three patients per week are pregnancy terminations. Dr. Charles has researched and published numerous articles in the fields of obstetrics and gynecology, including articles on amniocentesis, and Dr. Motew has conducted research in perinatal medicine, including published papers on premature labor, fetal monitoring and ultrasonography. Dr. Hector N. Zevallos and Dr. Robert C. Steptoe have also published numerous articles in the fields of obstetrics and gynecology. The Hope Clinic for Women, Ltd., presently performs approximately 440 abortions per month, of which approximately twenty percent are for patients under eighteen years of age and eighteen percent are for married women, and the National Health Care Services of Peoria, Inc., presently performs approximately 375 abortions per month, of which approximately thirty-seven percent are for patients under eighteen years of age and thirty-five are for married women.

In most cases, two elements must be satisfied in order to have standing to litigate a particular issue: (1) the plaintiff must allege that he has a personal stake in the outcome of the litigation and will suffer some threatened or actual injury if the statute is enforced; and (2) the plaintiff must assert his own legal rights and interests. *Warth v. Seldin*, 422 U.S. 490, 498-99

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[4] As noted above, the named defendants have moved either to dismiss or for summary judgment and have not filed memoranda in opposition to plaintiffs' motion for a preliminary injunction. Therefore, any arguments advanced against the issuance of a preliminary injunction are those of the intervenors.

[5] Defendants' preliminary claim that a conflict of interest exists between women and physicians and abortion clinics is insubstantial. *Wynn v. Scott*, 449 F. Supp. 1302, 1305 n.1 (N.D. Ill. 1978).

(1975). However, with respect to the second element, in abortion cases, physicians may assert the legal rights of their pregnant patients if the physicians themselves are threatened with actual injury, such as the risk of criminal prosecution if they do not comply with the statutory requirements. *Doe v. Bolton,* 410 U.S. 179, 188 (1973).

Defendants contend that plaintiffs do not have standing to challenge sections 1, 3.1(A), 3.1(B), 3.2, 3.5, 6(2), 6(3), 6(7), 8, 11(c) and 13 of the 1979 Law. Plaintiffs have standing to challenge sections 3.1(A) (the medical judgment provision, the intentional and knowing violation of which by a physician is a Class 2 felony), 3.1(B) (the medical consultation provision, the intentional and knowing violation of which by a physician is a Class 2 felony), 3.1(B) (the medical consultation provision, the intentional, knowing or reckless violation of which by a physician is a Class A misdemeanor), 3.2 (the informed consent provision, the intentional, knowing, or reckless violation of which by a physician is a Class B misdemeanor), 3.5 (the printed information provision which is referred to in sections 3.2, 3.3, and 3.4, the intentional, knowing or reckless failure to conform to any requirement of which is a Class B misdemeanor), and 6(3) (the ban on fetal research provision, the violation of which is a Class 1 felony) because they impose obligations on plaintiffs directly and affect their own legal interests.

No plaintiff has standing to challenge section 6(2) which provides that the "law of this State shall not be construed to imply that any human being aborted alive is not an individual under the 'Criminal Code of 1961,' approved July 28, 1961, as amended". Inasmuch as this section places no obligation upon plaintiffs or their pregnant patients, plaintiffs lack standing to challenge this section.

The same is true with respect to section 6(7) which provides that any

> "person who intentionally causes the fertilization of a human ovum by a human sperm outside the body of a living human female shall, with regard to the human being thereby produced, be deemed to have the care and custody of a child for the purposes of Section 4 of the Act to Prevent and Punish Wrongs to Children, approved May 17, 1877, as amended, except that nothing in that Section shall be construed to attach any penalty to participation in the performance of a lawful pregnancy termination."

No plaintiff has alleged that he is engaged in *in vitro* fertilization or has patients interested in *in vitro* fertilization. Therefore, no plaintiff has standing to challenge section 6(7).

Additionally, no plaintiff has standing to challenge section 8 which states:

> Upon a finding by the Juvenile Court that a live born infant has resulted from a voluntary abortion, such an infant has been abandoned pursuant to the procedures and provisions of the "Juvenile Court Act", approved August 5, 1965, as amended, and "An Act in relation to the adoption of persons, and to repeal an Act therein named", approved July 17, 1959, as amended. Such an infant, prior and subsequent to birth, is a minor and a child pursuant to the procedures and provisions of said Acts."

Plaintiffs have failed to allege that they or their pregnant patients would be injured in fact by this section. Therefore, they lack standing to challenge section 8 also.[6]

Moreover, plaintiffs do not have standing to challenge section 11(c) which provides that:

> Any person, firm, corporation, association, agency, institution, or other legal entity which solicits, offers or receives any kickbacks or bribes in connection with the

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[6] Plaintiffs also lack standing to challenge part of section 7. This will be discussed later in the opinion.

> performance of an abortion or which solicits, offers or receives a rebate or a fee for referring an individual to another person for the providing of an abortion commits a Class A misdemeanor.

None of the plaintiffs have alleged that they have engaged in any conduct or propose to engage in any conduct which they fear could violate this section. Therefore, plaintiffs lack standing to challenge section 11(c).

Finally, no plaintiff has standing to challenge section 13, which provides:

> No physician, hospital, ambulatory surgical center, nor employee thereof, shall be required against his or its conscience declared in writing to perform, permit or participate in any abortion, and the failure or refusal to do so shall not be the basis for any civil, criminal, administrative or disciplinary action, proceeding, penalty or punishment. If any request for an abortion is denied, the patient shall be promptly notified.

This section, which is unchanged from the Illinois Abortion Act of 1975 (the "1975 Act"), was challenged in *Wynn v. Scott,* 449 F. Supp. 1302 (N.D. Ill. 1978). In *Wynn* Judge Marshall, speaking for a three-judge district court, held that since no plaintiff had alleged that a physician or hospital had invoked or threatened to invoke this clause to prevent obtaining or performing an abortion, no plaintiff had standing to challenge section 13. 449 F. Supp. at 1309. This court finds no reason to disagree with Judge Marshall's conclusion.

Defendants also contend that plaintiffs have no standing to challenge the constitutionality of section 1 of the 1979 Law. Section 1 is not a substantive provision because it does not contain any requirements or sanctions. Therefore, it is unnecessary to determine whether plaintiffs have standing and whether section 1 is unconstitutional. *Wynn v. Scott,* 449 F. Supp. 1302, 1308 (N.D. Ill. 1978). *Accord, Wynn v. Scott,* 448 F. Supp.

997, 1006 (N.D. Ill. 1978), *aff'd sub nom. Wynn v. Carey,* 582 F.2d 1375 (7th Cir. 1978).

Initially plaintiffs argue that the 1979 Law is invalid in its entirety because it asserts an impermissible purpose in violation of the establishment of religion clause of the first amendment and the equal protection clause of the fourteenth amendment. The court cannot so conclude.

The Supreme Court has established a three-part inquiry in order to determine the constitutionality of legislation alleged to violate the establishment clause. *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 773 (1973). The 1979 Law satisfies all three parts of this inquiry: (1) it reflects a clearly secular legislative purpose, *Epperson v. Arkansas,* 393 U.S. 97 (1968); (2) it has a primary effect that neither advances nor inhibits religion, *School District of Abington Township, Pa. v. Schempp,* 374 U.S. 203 (1963); and (3) it avoids excessive government entanglement with religion, *Walz v. Tax Commission of City of N.Y.,* 397 U.S. 664 (1970).

If legislation operates to the disadvantage of a suspect class, *e.g.,* race or alienage, or impinges upon a fundamental interest explicitly or implicitly protected by the Constitution, *e.g.,* voting or privacy (procreation, marriage and related matters), it is subject to strict judicial scrutiny under the equal protection clause. If not, the legislation must be examined to determine whether it rationally furthers some legitimate, articulated state purpose. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 17 (1973). Under strict judicial scrutiny, legislation must be necessary for the achievement of a compelling state interest. While the 1979 Law does not operate to the disadvantage of some suspect class[7] and it does not, in its

[7] Classifications which impose possible criminal penalties on doctors who perform abortions while ignoring doctors who do obstetrical care or other medical procedures and which burden women who seek abortions while ignoring similarly situated women who seek prenatal care or other medical procedures are not suspect.

entirety, impinge upon a woman's fundamental privacy right to choose abortion,[8] it rationally furthers the state's legitimate interests.

Thus, the 1979 Law is not invalid in its entirety. Alternatively, plaintiffs argue that several, but not all, sections of the 1979 Law are unconstitutional. The court will address those challenges which are critical at this juncture of the litigation.[9]

Plaintiffs contend that the definition of viability contained in section 2(2) of the 1979 Law is unconstitutional under *Roe v. Wade,* 410 U.S. 113 (1973), *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976), and *Colautti v. Franklin,* 99 S. Ct. 675 (1979). Defendants, on the other hand, contend that the 1979 Law alters the definition of viability to conform to *Colautti.* Since several other sections of the 1979 Law incorporate the words "viable" or "viability"[10] and since the state may not impose criminal penalties to further its interest in the potential life of the fetus prior to viability, *Colautti,* 99 S. Ct. at 681 n.7, the constitutionality of this definition is critical.

Viability is defined in section 2(2) as

"that stage of fetal development when, in the medical judgment of the attending physician based on the particu-

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[8] To the extent that a particular section of the 1979 Law, if any, may impinge upon a woman's fundamental privacy right, it will be addressed later in the opinion.

[9] Plaintiffs argue that the amendment to section 2(1) is unconstitutional because it arbitrarily reduces the period of the first trimester by approximately three days by beginning with ovulation rather than conception. Section 2(1) defines "first trimester" as the "first twelve weeks of gestation commencing with ovulation rather than computed on the basis of the menstrual cycle." Since trimesters are incapable of definition with precision, Roe v. Wade, 410 U.S. 113, 163 (1973), this issue, and other similar issues, may be resolved later on a motion for summary judgment or at trial.

[10] The words "viable" or "viability" are referred to in sections 4, 5(1), 5(2), 5(3), 6(1), and 6(4) of the 1979 Law.

> lar facts of the case before him, there is a reasonable likelihood of more than momentary survival of the fetus outside the womb, with or without artificial support."

The critical words are "more than momentary". In *Colautti* the Supreme Court emphasized that viability does not mean "merely momentary survival", 99 S. Ct. at 681, and stated:

> "Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." 99 S. Ct. at 682.

Thus, the Supreme Court has used the word "momentary" to explain what viability *does not mean* and has used the word "sustained" to explain what viability *does mean.* The court concludes that by using the words "more than momentary", instead of the word "sustained", section 2(2) is unconstitutionally vague and overbroad.

It must be underscored that under section 11(a) criminal penalties attach for intentional violations of any provision of the 1979 Law. A criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute or is so indefinite that it encourages arbitrary and erratic arrests and convictions is void for vagueness. *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972). The definition of viability suffers from both of these infirmities.

Furthermore, the phrase "more than momentary", taken literally, is overbroad because it describes fetuses that are incapable of "sustained survival", as that term is used in *Colautti,* as well as those that are capable of such survival. Thus, plaintiffs have established a reasonable likelihood that section 2(2) is unconstitutional.[11]

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[11] As a result, there is a reasonable likelihood that sections 4, 5(1), 5(2), 5(3), 6(1), and 6(4) are unconstitutional because they incorporate the words "viable" or "viability".

The definitions of "abortion" and "abortifacient" are not unconstitutional. The term "abortion" is defined in section 2(6) as

> "the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with intent to cause fetal death."

This definition simply cures the vagueness problems found in the 1975 Act's definition of "criminal abortion". *Wynn v. Scott,* 449 F. Supp. at 1328-30, *aff'd sub nom. Wynn v. Carey,* 599 F.2d 193, 194-95 (7th Cir. 1979). The term "abortifacient" is defined in section 2(10) as

> "any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed."

The definition is not inconsistent with the definition of abortion, as contended by plaintiffs. Thus, plaintiffs have not established a reasonable likelihood that sections 2(6) and 2(10) are unconstitutional.[12]

Section 3.1(A) which is captioned "Medical Judgment" states that no "abortion shall be performed except by a physician after he determines that, in his best clinical judgment, the abortion is necessary". An identical provision was upheld in *Doe v. Bolton,* 410 U.S. 179, 191-92 (1973). There the Supreme Court expressly rejected plaintiffs' argument that such a provision is vague:

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[12] Since plaintiffs' challenge to section 11(d) is premised upon the unconstitutionality of the terms "abortifacient" and "abortion", plaintiffs have not established a reasonable likelihood that section 11(d) is constitutional.

> "Whether . . . 'an abortion is necessary' is a professional judgment that the . . . physician will be called upon to make routinely.
>
> . . . the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman." 410 U.S. at 192.

Thus, plaintiffs have not established a reasonable likelihood that section 3.1(A) is unconstitutional.[13]

Section 3.2(A) of the 1979 Law prohibits performance of an abortion without "the voluntary and informed consent of the woman upon whom the abortion is to be performed." Parts (a) and (b) of subsection (1) of section 3.2(A) set forth a two-part test to determine when consent to an abortion is voluntary and informed. Part (a) states that:

> "The woman [must be] provided, at some time before the abortion, with a true copy of her pregnancy test

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[13] Plaintiffs do not strenuously challenge section 3.1(B)(1) which requires, *inter alia,* that before an abortion may be performed, the woman upon whom the abortion is to be performed must have a private medical consultation with the physician who is to perform the abortion. The terms "best clinical judgment" and "necessary", which are used in section 3.1(B)(1), are not vague for the reasons set forth above with respect to section 3.1(A).

Plaintiffs object to section 3.1(B)(2) which states that section 3.1(B)(1) shall not apply when there exists a medical emergency on the ground that "medical emergency" is not defined. What is or is not a medical emergency varies from case to case and this determination is a matter for the judgment of the responsible attending physician. *Cf. Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 64 (1976) (viability). Thus, plaintiffs have not established a reasonable likelihood that either part of section 3.1(B) is unconstitutional.

result by the physician who is to perform the abortion and the woman [must be] provided, at least 24 hours before the abortion, with the following information by the physician who is to perform the abortion:

(i) The name of the physician who will perform the abortion,

(ii) The particular medical risks associated with the particular abortion procedure to be employed,

(iii) The probable gestational age of the fetus at the time the abortion is to be performed, and

(iv) The printed information prescribed in Section 3.5 of this Law. . ..[14]

The right of privacy, which is not absolute, is subject to the state's interest in the health of its critizens. *Roe v. Wade,* 410 U.S. at 155. The legitimate state interest at stake in section 3.2 is protecting the woman by requiring an informed and voluntary consent to an abortion. As the Supreme Court stated in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. at 67: "The decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences". The court believes that part (a) of the informed consent provision serves the state's interest. It does no more than give the woman information regarding what will be done and its consequences. As a result, it does not unduly burden the exercise of the woman's fundamental rights. Thus, plaintiffs have not established a reasonable likelihood that section 3.2(A)(1)(a) is unconstitutional.

Part (b) states that:

"Prior to submitting to the abortion, but subsequent to receiving the information prescribed by paragraph (A) (1) (a) of Section 3.2, the woman [must certify] in writing that she has received that information from the physician at least 24 hours before the abortion is to be

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[14] The constitutionality of section 3.5 is discussed later in the opinion.

> performed, that she understands it, that she consents to the abortion, and that her consent is voluntary and not the result of coercion."[15]

The state's interest in insuring that a woman's abortion decision is made after careful consideration of all of the facts applicable to her situation is furthered by the twenty-four hour waiting period requirement. From the record before the court, it cannot conclude that the twenty-four hour waiting period requirement unduly burdens the right to seek an abortion. *Bellotti v. Baird,* 99 S. Ct. 3035, 3046 (1979). Thus, plaintiffs have not established a reasonable likelihood that section 3.2(A)(1)(b) is unconstitutional.

Section 3.3 of the 1979 Law contains the parental consultation provision. According to subsection (A) of that section, an abortion may not

> "be performed upon a minor under the age of 18 years . . . unless at least 24 hours before the abortion the physician who is to perform the abortion or his agent informs each living parent or the guardian of the minor . . . that his or her daughter or ward is considering an abortion and provides each parent or the guardian with [certain] information. . .."

In *Bellotti v. Baird,* 99 S. Ct. 3035 (1979), the Supreme Court struck down a parental consent statute. In so doing the plurality opinion indicated what type of parental consultation statute would be upheld.

According to *Bellotti,* a state may reasonably determine that parental consultation often is desirable and in the best interest of the minor because minors often lack the ability to make fully informed choices that take into account both immediate and long-range consequences. However, because of

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[15] Except for the twenty-four hour waiting period, section 3.2(A)(1)(b) is virtually identical to the informed consent provision upheld in *Danforth.*

the unique nature of the abortion decision, especially when made by a minor, a state must act with particular sensitivity when it legislates to foster parental involvement in this matter. 99 S. Ct. at 3046-47.

In *Danforth,* the Supreme Court held that the unique nature and consequences of the abortion decision made it inappropriate "to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy". 428 U.S. at 74. As a result the plurality indicated in *Bellotti* that if a state decides to require prior parental notice or consultation, it must also provide for an alternative procedure whereby every minor will have the opportunity if she so desires to go directly to a court without first consulting or notifying her parents. 99 S. Ct. at 3048-50.

Section 3.3 does not provide for such an alternative procedure. The only exceptions to the parental notice requirement set forth in section 3.3(B) are for emancipated minors and medical emergencies. Thus, plaintiffs have established a reasonable likelihood that section 3.3 is unconstitutional.

In section 3.4(A) the 1979 Law provides that an abortion may not

> "be performed upon a married woman unless, at least 24 hours before the abortion, the physician who is to perform the abortion or his agent informs the spouse of the woman upon whom the abortion is to be performed that his wife is considering an abortion and provides him with [certain] information."

The only exceptions to section 3.4(A) set forth in section 3.4(B) are situations where the woman and her spouse are under a judgment of legal separation issued by a court of competent jurisdiction or where a medical emergency exists. In *Danforth* the Supreme Court recognized the legitimacy of a husband's interest in his wife's pregnancy, the state's interest in

protecting the marital relationship and the potential impact of an abortion decision on that relationship:

> We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society . . . [and] recognize that the decision whether to undergo or to forego an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious. 428 U.S. at 69-70.

However, statutes restricting abortions must be narrowly drawn to express only the legitimate state interests at stake. *Roe v. Wade,* 410 U.S. at 155. Section 3.4 is not narrowly drawn; indeed, it is overinclusive. It does not make an exception for couples who are estranged but not legally separated, for husbands who have deserted their wives prior to the pregnancy, or for husbands who are not responsible for the pregnancy. Thus, plaintiffs have established a reasonable likelihood that section 3.4 is unconstitutional.

Section 3.5 requires that the Department of Public Health publish printed materials designed to inform concerned persons of "public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent" and "the probable anatomical and physiological characteristics of the fetus at the various gestational ages at which abortion might be performed".[16] For the same reasons that plaintiffs have not established a reasonable likelihood that section 3.2(A)(1)(a) is unconstitutional, they have not estab-

[16] Through incorporation by reference, section 3.2 requires the physician to give this printed material to the woman. It does not require him to read it to her and section 3.5(3) states that nothing in section 3.5 shall be construed to limit the right of the physician to express to the woman his own views concerning the materials prescribed by section 3.5.

lished a reasonable likelihood that the above-quoted parts of sections 3.5(1) and (2) are unconstitutional. However, this is not true with respect to the following paragraph which section 3.5(2) states must appear at the end of the printed materials:

> "The State of Illinois wants you to know that in its view the child you are carrying is a living human being whose life should be preserved. Illinois strongly encourages you not to have an abortion but to go through to childbirth. You are being given a list of agencies and services which can help you to continue the pregnancy, and assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The State of Illinois strongly encourages you to contact some of them before making a final decision about abortion."

While the state has an important and legitimate interest in protecting the potentiality of human life, it also has an important and legitimate interest in protecting and preserving the health of the pregnant woman. These interests are separate and distinct. *Roe v. Wade,* 410 U.S. at 162. However, the state may not protect fetal life at the expense of the life or health of the mother. *Id.* at 163-64. As a result the paragraph is unconstitutionally underinclusive in that it fails to provide for those instances when the state may not promote the policy announced in the paragraph. Thus, plaintiffs have established a reasonable likelihood that the paragraph required under section 3.5(a) is unconstitutional.

Section 6(3) provides that

> "No person shall use or sell any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive. . . . Nothing in this Law shall prohibit the use or sale of any tissues or cells obtained from a dead fetus or dead premature infant whose death did not result from an induced abortion for use in

> therapeutic or scientific research, provided that written consent for such use or sale is obtained from one of the parents of such an infant or fetus. . . .

The first sentence of section 6(3) was upheld in *Wynn v. Scott*, 449 F. Supp. at 1322, and this court finds no reason to differ with Judge Marshall's conclusion. The second sentence in the above quotation was added by the 1979 Law. Since this sentence merely serves to provide an exception to the proscription of section 12, as will be discussed later in the opinion, there is no basis upon which these plaintiffs may attack its constitutionality. Thus, plaintiffs have not established a reasonable likelihood that section 6(3) is unconstitutional.

Essentially section 6(6) requires that the physician inform the woman of the existence of any known anesthetics or analgesics to abolish or alleviate organic pain to the fetus caused by the particular method of abortion to be employed.[17]

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[17] Section 6(6) states:

> "When there exists reasonable medical certainty that the particular method of abortion to be employed will cause organic pain to the fetus and there exists reasonable medical certainty that use of an anesthetic or analgesic which the physician knows to be available would abolish or alleviate organic pain to the fetus caused by the particular method of abortion to be employed, the physician who is to perform the abortion shall inform the woman upon whom the abortion is to be performed that such an anesthetic or analgesic is available for use to abolish or alleviate organic pain caused to the fetus by the particular method of abortion to be employed. Any person who performs an abortion with knowledge that any such reasonable medical certainty exists, or with reckless disregard as to whether any such reasonable medical certainty exists, and intentionally fails to so inform the woman commits a Class B misdemeanor. Paragraph (6) of Section 6 shall not apply when, in the medical judgment of the physician who is to perform the abortion based upon the particular facts of the case before him, there exists a medical emergency or the administration of such an anesthetic or analgesic would decrease a known possibility of more than momentary

(Footnote continued on following page)

Section 6(6) is not unconstitutional because it asserts an interest in the fetus prior to viability. This section in many respects is analogous to the informed consent provision found in section 3.2(A). It does not restrict the decision of the woman and her physician regarding abortion. *Danforth,* 428 U.S. at 66. The state has an improtant and legitimate interest in the fetus prior to viability but the interest does not become compelling until viability, when the state may proscribe abortion except when it is necessary to preserve the life or health of the mother. *Roe v. Wade,* 410 U.S. at 162-64. Thus, plaintiffs have not established a reasonable likelihood that section 6(6) is unconstitutional.

Section 7 states in part:

> "In every case in which any infant is born alive as the result of a voluntary abortion, the physician who has performed the abortion shall notify the Juvenile Court that such an infant has been born. When such an infant has been born alive in a hosptial or licensed facility, the hosptial or facility shall also notify the Juvenile Court of the birth of the infant."

Plaintiffs have not challenged the constitutionality of this part of section 7 which requires physicians and hospitals to report such live births. Rather plaintiffs link their challenge of section 7 to their challenge of section 8. As discussed previously, plaintiffs do not have standing to challenge section 8. Since the remainder of section 7, the constitutionallity of which is challenged by plaintiffs, requires the Juvenile Court to take certain steps, not the physicians or their patients, plaintiffs lack stand-

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(Footnote continued from preceding page)

> survival of the fetus apart from the body of the mother, with or without artifical support. Paragraph (6) of Section 6 shall not apply when the physician who is to perform the abortion administers an anesthetic or an analgesic to the woman to abolish or alleviate pain caused to her by the particular method of abortion employed and he knows there exists reasonble medical certainty that such use will abolish organic pain caused to the fetus during the course of the abortion.

ing to challenge that part of section 7.[18] *See Danforth,* 428 U.S. at 62 n.2. Thus, plaintiffs have not established a reasonable likelihood that the first two sentences of section 7 are unconstitutional and plaintiffs do not have standing to challenge the constitutionality of the last two sentences of section 7.

Section 9 states

> "that the method or technique of abortion known as saline amniocentesis, whereby amniotic fluid is withdrawn and a saline solution if inserted into the amniotic sac for the purpose of causing fetal death and artifically inducing labor, is deleterious to material health and [therefore it] is . . . prohibited after the first trimester of pregnancy, unless it is the medical judgment of the physician who is to perform the abortion based on the particular facts of the case before him that in the interest of the woman's health saline amniocentesis should be employed in preference to any other method of abortion."

After the first trimester the state, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. *Roe v. Wade,* 410 U.S. at 164. The question then is whether section 9 is a restriction which reasonably relates to the preservation and protection of maternal health. *Danforth,* 428 U.S. at 76. The record establishes that the alternative method of prostaglandin installation is signficantly more dangerous than the saline technique. A regulation which bars a relatively safe procedure but permits a much more risky one is not

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[18] The remainder of section 7 states:

> "Upon notice of the birth of such an infant, the Juvenile Court shall initiate any proceeding and determinations which are appropriate under the provisions of Section 8 of this Law. During the course of such proceedings and determinations, the Juvenile Court shall not disclose the identity of the mother of any such infant except to the extent disclosure is necessary to secure the rights or interests of the infant, the infant's father, or the state."

reasonably related to maternal health. *Danforth*, 428 U.S. at 75-79; *Wynn v. Scott*, 449 F. Supp. at 1325. Thus, plaintiffs have established a reasonable likelihood that section 9 is unconstitutional.

Section 10 requires that reports of each abortion performed contain the following information:

> "(a) Identification of the physician who performed the abortion and the facility where the abortion was performed;
>
> (b) The political subdivision in which the patient resides:
>
> (c) Patient's date of birth, race and marital status;
>
> (d) Number of prior pregnancies;
>
> (e) Date of last menstrual period;
>
> (f) Type of abortion procedure performed;
>
> (g) Complications;
>
> (h) The date the abortion was performed;
>
> (i) Certification that the fetus was not viable or medical indications for any abortion performed when the fetus was viable;
>
> (j) Medical indications for the use of saline amniocentesis;
>
> (k) Medical indications for the nullification of any waiting period required under this Law;
>
> (l) Basis for any medical judgment that a medical emergency existed as required by Sections 3.1, 3.2, 3.3 or 3.4 of this Law;
>
> (m) The basis for the clinical judgment that an abortion is necessary; and
>
> (n) The date of the medical consultation required by paragraph (B) of 3.1, the time began and the time it ended:

Plaintiffs contend that these reporting requirements are unconstitutional because they are overly burdensome and because

they violate the fifth amendment rights of physicians performing abortions. Paragraphs (a) through (g) have already been upheld in *Wynn v. Scott,* 449 F. Supp. at 1326-27, *aff'd sub nom. Wynn v. Carey,* 599 F.2d at 194.[19]

In *Danforth* the Supreme Court upheld similar recordkeeping and reporting requirements on the grounds that they can be useful to the state's interest in protecting the health of its female citizens and that they may be a resource that is relevant to decisions involving medical experience and judgment. However, the Supreme Court cautioned that such requirements may not discourage abortions indirectly by imposing a sheer burden of recordkeeping detail. 428 U.S. at 81. Plaintiffs have not established that the addition of paragraphs (h) through (n) is unconstitutionally burdensome.[20]

Nor does section 10 violate the physician's privilege against compulsory self-incrimination. It is not directed to a "highly selective group inherently suspect of criminal activities" and it "is essentially regulatory, not criminal". *California v. Byers,* 402 U.S. 424, 430 (1971). A mere possibility of incrimination is insufficient. *Id.* at 428. Thus, plaintiffs have not established a reasonable likelihood that section 10 is unconstitutional.

Section 11(e) states:

> Any physician who diagnoses a woman as having complications resulting from an abortion shall report the patient's name, the diagnosis and a summary of her physical symptoms to the Department. If the physician making the diagnosis of a complication knows the identity

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[19] In *Wynn* the two sentences in section 10 which refer to and incorporate the Vital Records Act were held unconstitutional because the woman's right to privacy was not adequately protected. Extensive amendments to section 10 by the 1979 Law cure this defect.

[20] Since paragraphs (i), (j) and (l) refer to sections to [sic] the 1979 Law to which plaintiffs have established a reasonable likelihood of unconstitutionality, there is a reasonable likelihood that paragraphs (i), (j) and (l) are unconstitutional.

> of the physician who performed the abortion or the name or location of the facility where it was performed, he shall also report such information to the Department. Any physician who intentionally or knowingly violates paragraph (e) of Section 11 commits a Class C misdemeanor.

Section 11(e) is not unconstitutionally vague because the term "complication" is undefined. This word has a commonly accepted medical meaning and is substantially limited by the phrase "resulting from an abortion". Thus, plaintiffs have not established a reasonable likelihood that section 11(e) is unconstitutional.

Finally, plaintiffs challenge section 12 which states:

> The dead fetus and all tissue removed at the time of abortion shall be submitted for a gross and microscopic analysis and tissue report to a board eligible or certified pathologist as a matter of record in all cases. The results of the analysis and report shall be given to the physician who performed the abortion within 7 days of the abortion and such physician shall report any complications to his patient within 48 hours of receiving a report. There shall be no exploitation of or experimentation with the aborted fetus or tissue. Any evidence of live birth or of viability shall be reported immediately to the Department by the pathologist.

A very similar provision was before the three-judge district court in *Wynn v. Scott,* 449 F. Supp. at 1322. There the court held that section 12 was constitutional because there was a rational connection between section 12 and the state's interest in regulating social and health matters. With one exception, this court finds no reason to disagree with that conclusion. Despite the operation of the savings clause contained in section 6(3),[21] the third sentence of section 12 prohibits testing of

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[21] Section 6(3) provides, in pertinent part, that

"Nothing in this Law shall prohibit the use or sale of any tissues or cells obtained from a dead fetus or dead premature infant

(Footnote continued on following page)

fetuses whose death resulted from induced abortions for genetic complications to confirm physicians' *in utero* diagnoses. The statute thereby interferes with the privacy right in procreation, *Roe v. Wade,* 410 U.S. at 152; *Skinner v. Oklahoma,* 316 U.S. 535, 541-42 (1942), which includes family planning. Thus, plaintiffs have established a reasonable likelihood that the third sentence of section 12 is unconstitutional.[22]

With respect to the sections of the 1979 Law that plaintiffs have established at least a reasonable likelihood of success on the merits, they have also established that they have no adequate remedy at law and will be irreparably harmed if a preliminary injunction does not issue, that the threatened injury to plaintiffs outweighs the threatened harm a preliminary injunction may inflict on defendants, and that the issuance of a preliminary injunction will serve the public interest. *Ekanem v. Health & Hospital Corporation of Marion County,* 589 F.2d 316, 319 (7th Cir. 1978).

Accordingly, plaintiffs' motion for a preliminary injunction is granted with respect to section 2(2), section 3.3, section 3.4, the paragraph required under section 3.5(2), section 4, section 5(1), section 5(2), section 5(3), section 6(1), section 6(4), section 9, paragraphs (i), (j) and (l) of section 10 and the

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(Footnote continued from preceding page)

whose death did not result from an induced abortion for use in therapeutic or scientific research, provided that written consent for such use or sale is obtained from one of the parents of such an infant or fetus.

[22] The court notes that in *Wynn,* the three-judge district court upheld this sentence on the ground that it did not have the effect of discouraging abortions. That court was not faced with a challenge to this sentence based on its interference with the broader fundamental rights pertaining to procreation and family planning.

third sentence of section 12. Plaintiffs' motion for a preliminary injunction is denied with respect to all other sections of the 1979 Law.

It is so ordered.

JOEL M. FLAUM [s]
United States District Judge

Dated: November 16, 1979

Office-Supreme Court, U.S.
FILED
JUN 29 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1379

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

EUGENE DIAMOND AND JASPER WILLIAMS

APPELLANTS

v.

ALLAN G. CHARLES, ET AL.

APPELLEES

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v. Wade, 410 U.S. 113, as counsel or guardian ad litem, for the purpose of defending their right to life under the U.S. Constitution.

INTEREST OF COUNSEL

Alan Ernest is a lawyer in the District of Columbia and a member of the bar of this Court. His interest is to defend the constitutional right to life of children unborn and born alive. The parties have not done this.

This is effectively a motion to allow retained counsel to represent the victims being killed, since there will be no expense to this Court, or to the taxpayers.

SUMMARY OF ARGUMENT

Roe v. Wade is void, because the Court decreed deliberate killings to be "liberty"

which had been democratically defined to be "murder" since long before the adoption of the Fourteenth Amendment.

The decree that "MASS MURDER IS LIBERTY" is the ultimate lawless act.

Since Roe v. Wade is void, this disposes of all the issues raised by the parties.

The victims being killed are entitled by the U.S. Constitution to be especially represented by counsel (no cost to taxpayers) to defend their right to life under the U.S. Constitution.

When judges decree that "MASS MURDER IS LIBERTY," and then maintain the killings by refusing to allow counsel to represent the victims, then it cannot be pretended that it is any longer the government of the United States, or any government of Constitution and laws.

The amicus curiae brief of the Legal Defense Fund For Unborn Children is incorporated herein by reference.

ARGUMENT

I.

ROE v. WADE IS VOID, BECAUSE THE SUPREME COURT HITLER-LIKE DECREED KILLINGS TO BE "LIBERTY" WHICH HAD BEEN DEMOCRATICALLY DEFINED TO BE "MURDER." THE DECREE THAT "MASS MURDER IS LIBERTY" IS THE ULTIMATE LAWLESS JUDICIAL ACT.

In Roe v. Wade, the Supreme Court decreed killings to be "liberty" which had been democratically defined to be "murder" since long before adoption of the Fourteenth Amendment.[1]

1./ When the Fourteenth Amendment was adopted, an abortion was murder if the child was "born alive." And a child could be "born alive" long before viability.

A. The English Common Law

The English common law, as stated in the works of Coke, (3 Inst. 50), Hawkins, (1 Hawkins Ch. 13, s. 16) and Blackstone, (4 Bl. Com. 198) defined an abortion, in which a "quick" child died after being "born alive," to be "murder."

Thus, under the common law, an abortion of an unviable child, a child too immature to survive outside the womb, who died after being born alive, was "so horrible an offense" and "this is murder." 3 Inst. 50.

Regina v. West, 2 C & K 784 (1848) followed Coke, Hawkins, and Blackstone, and ruled that an abortion was murder if the child

In 1857, the American Medical Association began a two year study of all the abortion laws in the United States. The 1859 report stated the law of murder throughout the United States, as follows:

> "If a person, intending to procure abortion, does an act which causes the child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it in a situation in which it cannot live, is guilty of murder." Reported in A.S. Taylor, infra page 7, at 462. (emphasis added)

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was born alive, even though the child died because it was too immature to survive outside the womb.

The indictment for murder alleged that the defendant had inserted a "certain pin ... upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Regina v. West, 2 C & K at 784-85. The child died shortly afterward. A "medical witness" had testified:

"[I]t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any

Yet, in 1973, this is the very killing which the U.S. Supreme Court decreed to be "liberty." See photo, infra A-1.

In the plainest terms, the U.S. Supreme Court decreed: "MASS MURDER IS LIBERTY."

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considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K at 786.

The judge, relying on Coke and Blackstone, instructed the jury that if the child were "born alive," the abortion was murder, even though the child were not viable:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.... I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes the child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Regina v. West, 2 C & K at 788.

The case of Regina v. West, supra, was

Many people would be astonished to learn that this case for the unborn is the very case they would have to present for themselves if their own right to life were challenged in a federal court.

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cited by the leading English writers as the correct statement of the law of murder. See, 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516 (Penrose Am. ed. 6th ed. 1866). An abortion which resulted in an unviable child being born alive was murder.

B. THE AMERICAN LAW OF MURDER IN 1868

The common law is the dictionary for the state and federal homicide statutes; American courts used it to construe the meaning of their murder statutes. Hamilton v. United States, 26 App. D.C. 382 (1905); Clarke v. State, 117 Ala. 1 (1898).

By the time the Fourteenth Amendment was adopted in 1868, the leading American legal authorities had specifically cited Regina v. West, supra, as the correct statement of the law of murder.

As Wharton explained the law, A Treatise on

For example, take almost any group of persons, such as the insane, or invalids, or Jews. Suppose it were claimed in federal court that it is "liberty" to deliberately kill members of these groups, as well as the unborn.

What factual, non-argumentative evidence

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the Law of Homicide in the United States 93 (1855):

"If a person intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

American authorities agreed that this was the correct statement of the law of murder. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, Manual of Medical Jurisprudence 462, 517 (Penrose Am. ed. 6th ed. 1866). This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.

C. THE LAW OF MURDER AND THE MEANING OF THE FOURTEENTH AMENDMENT

If the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant from its mother's

could be found to establish their right to life under the U.S. Constitution?

As the case for the unborn shows, it would do no good to object that no one ever heard of a "liberty" to deliberately kill the insane, or invalids, or Jews - or to object that such killings had thereto been defined as criminal.

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womb and leaving it to die, as murder, then it is certain that they did not intend to exclude the lives of these children from the protection of the Fourteenth Amendment so they could be deliberately killed with impunity from criminal statutes.

If the people who framed and adopted the Amendment had condemned the deliberate killing of Jews to be murder, it is certain that they did not intend to exclude Jews from the protection of the Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes. Changing the names of the victims does not change the legal result.

But by seizing upon viability, the Supreme Court decreed the same killing to be "liberty" which the American people had universally defined to be "murder." It is a naked decree without any investigation whatever into the law of murder. In its ignorance, the Court decreed: "Mass Murder is Liberty."

Since the universal words "any person" in

And the Fifth and Fourteenth Amendments merely state that they protect the life of "any person." So, as with the unborn, the Amendments do not expressly refer to the insane, or invalids, or Jews; and their legislative histories do not appear to specifically refer to the insane, or invalids, or Jews.

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the Fourteenth Amendment must include all persons whose lives were protected by the law of murder when the Amendment was adopted, the lives of these children were specifically guaranteed by the Amendment. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, then the lives of these children are still protected by the Fourteenth Amendment. Roe v. Wade is void.

D. THE HYSTEROTOMY ABORTION UNDER ROE v. WADE

A common way to perform abortions under Roe v. Wade is by hysterotomy. Commonwealth v. Edelin, 359 N.E. 2d 4 (Mass. 1976). A hysterotomy is essentially a caesarean, in which a live but unviable child is taken from the womb and left to die. HEARINGS ON THE PROPOSED CONSTITUTIONAL AMENDMENTS ON ABORTION, BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES,

As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; and their legislative histories, to the extent they have any, do not appear to specifically refer to these groups.

The principle in the Declaration of

94th Cong., 2d Sess., Ser. 46, Part 1, at 391 (1976).

As established by medical testimony at these 1976 House abortion hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive." Id., at 397.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder.

E. ROE v. WADE AND MISTAKE OF LAW

The constitutional provisions against ex post facto laws do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1913). And mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed 1969). The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft #4, Comments Sec. 2.04, at 138.

Since Roe v. Wade is a mistake of law, mass murder is being perpetrated in the United

Independence, that all people are "created" equal, and endowed with an unalienable right to life, having been sneered out of court in Roe v. Wade, now provides no assurance for anyone. The Court so perverted the Declaration of Independence as to amount to just this: "All men are created equal, except those created to be murdered for the convenience of others."

States under guise of law. The Roe v. Wade hysterotomy killings, by definition under the law of murder when the Fourteenth Amendment was adopted, and thus also constitutional law, violate the murder statutes throughout the United States.

The Supreme Court decreed mass murder to be liberty without any examination of the law of murder; it was a naked decree. And as Abraham Lincoln warned, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him. 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. 3 Wharton's Criminal Law and Procedure 673 (12th ed. 1957).

And year after year the U.S. Supreme Court has deliberately adhered to its decree that

So, what factual, non-argumentative evidence is there for the insane, or invalids, or Jews to protect themselves from a judicial decree that it is "liberty" to deliberately kill them with impunity from criminal statutes?

"Mass Murder is Liberty" in the very teeth of challenges that these children were being murdered in violation of the Constitution and laws of the United States, and of the States. See amicus curiae brief of The Legal Defense Fund for Unborn Children, filed in Akron v. Akron Center For Reproductive Health, 462 U.S. 416 (1983).

This is deliberation and premeditation unparalleled in the legal history of the world. The Justices responsible for these killing may be facing the death penalty in very many states.

It may be that the judges responsible for these murders did not believe that they were breaking the law. But, as Justice Oliver Wendell Holmes once wrote: "Ignorance of the law is no excuse for breaking it....It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (Little Brown paperback 1963).

Roe v. Wade is not going to protect one

The case for the unborn is the case for many others; it is this same body of factual evidence which many people must ultimately rely upon to establish that their right to life is protected by the U.S. Constitution.

If the people who framed and adopted the Fourteenth Amendment had condemned the deliberate killing of Jews to be "murder," then it is certain that they did not intend to exclude the lives of Jews from the

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single judge from the law of murder, because it is a mistake of law. Mass murder is not liberty. These children were murdered in violation of the Constitution and positive criminal statutes.

F. CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

Since the U.S. Constitution is "the supreme law of the land," and the evidence proves that the lives of these children are protected by the U.S. Constitution, Roe v. Wade is void.

protection of the U.S. Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes.

And merely changing the names of the victims would not change this conclusion.

Since the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant, whether viable or not, from its mother's womb and leaving it to die to be "murder," it is certain that the framers did not intend the Amendment to create a "liberty" to deliberately kill these children with impunity from criminal statutes. It is certain that the lives of these children are protected by the U.S. Constitution.

Since the right to life protected by the Constitution does not just disappear with time, as whitewash weathers off an aging fence, it is certain that the lives of these children are still protected by

the U.S. Constitution. And since the Constitution is the "supreme law of the land," it is certain that Roe v. Wade is void; it is not law.

The thousands of "born alive" abortions since 1973 can be prosecuted as murder.

If the Court had decreed it "liberty" to deliberately kill Jews, it would rightly be denounced as murder. Judges may have more sympathy for other victims, but changing the names of the victims from "Jew" to "unborn" will not change the legal result.

In his novel "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, yet, the U.S. Supreme Court has defrauded the American people into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

When judges decree that "MASS MURDER IS LIBERTY," then it can not be pretended that

it is any longer the government of the United States - or any government of constitution and laws.

Abraham Lincoln ridiculed the Dred Scott decision by reducing it to its plainest terms: "That if any one man, choose to enslave another, no third man shall be allowed to object."[2] In Roe v. Wade, the Court invented an even more astonishing falsehood, "That if any one man, choose to murder another, no third man shall be allowed to object."

The U.S. Supreme Court has Hitler-like asserted to legalize mass murder. By

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2./ 2 Collected Works of Abraham Lincoln 462 (Basler ed. 1953). In Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 451 (1857), the U.S. Supreme Court held that the word "person," as used in the Constitution, did not include Negroes. While the Court did not assert a "liberty" to deliberately kill Negroes, the Court did rule that "the right to property in a slave is distinctly and expressly affirmed in the Constitution," and Congress could not prohibit slavery in the federal territories.

changing the names of the victims, the Court has duplicated the conduct of "the supreme judge" of Nazi Germany.[3]

The evidence shows that the U.S. Supreme Court is committing mass murder under the guise of law; the dagger of the assassin has been concealed beneath the robe of the jurist. Roe v. Wade is void.

3./ The Nuremberg court described how Hitler was "the supreme judge" of Nazi Germany. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011 (1951). This "supreme judge" decreed deliberate killings to be legal which had been defined as criminal. At Nuremberg, the Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted within the authority of the decrees of "the supreme judge." United States v. Altstoetter, supra, 983-85. But the Nuremberg Court held, "The dagger of the assassin was concealed beneath the robe of the jurist." United States v. Altstoetter, supra, 985.

By changing the name of the victims from "Jew" to "unborn," the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany. But changing the name of the victims will not change the legal result. Roe v. Wade is murder.

II.
THE VICTIMS BEING KILLED BY ROE v. WADE ARE CONSTITUTIONALLY ENTITLED TO BE ESPECIALLY REPRESENTED BY COUNSEL TO DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

The victims being killed by Roe v. Wade have a constitutional right to be especially represented by a next friend, or counsel, at no cost to taxpayers, to defend their right to life under the U.S. Constitution.[1]

If the constitution would not permit a court to condemn one single Jew to death in a criminal trial, but deny assistance of

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1./ Goldberg v. Kelly, 397 U.S. 254, 268-270 (1970); In Re Gault, 387 U.S. 1 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963).

The U.S. Constitution will not permit any judge to exclude anyone from the protection of the U.S. Constitution, so the victim can be deliberately killed with impunity from criminal statutes, without assistance of counsel to defend the victim's right to life under the U.S. Constitution.

When judges decree that "MASS MURDER IS LIBERTY," and then maintain the killings by refusing to allow the victims being killed to be assisted by counsel to defend their right to life under the U.S. Constitution, then it cannot be pretended that it is any longer the government of the United States, or any government of Constitution and laws.

counsel, then neither will the Constitution permit a court to condemn all Jews in the United States to death, without counsel, by calling it a civil proceeding, and decreeing that the lives of Jews are not protected by the U.S. Constitution, and it is "liberty" to deliberately kill any or all Jews in the United States with impunity from criminal statutes.

If the Roe v. Wade process were used to decree a "liberty" to kill Jews, it would rightly be condemned as murder. By merely changing the names of the victims, this is now going on in the courts of the United States. But changing the names of the victims will not change the legal result.

The unborn have never been represented by counsel in the entire Roe v. Wade process. The unborn have a right under the U.S. Constitution to be especially represented by counsel to defend their right to life under the U.S. Constitution.

III.

THE U.S. SUPREME COURT HAS DECREED "MASS MURDER IS LIBERTY," AND IT HAS MAINTAINED THE KILLINGS, YEAR AFTER YEAR, BY REFUSING TO ALLOW COUNSEL TO REPRESENT THE VICTIMS BEING KILLED. THE HUMAN MIND CANNOT IMAGINE A MORE CORRUPT JUDICIAL PROCESS.

When judges willfully deprive the unborn of the right of assistance of counsel to defend their right to life under the U.S. Constitution, it is not only unconstitutional, it is criminal.[1]

The human mind could not imagine a more corrupt judicial process:

(1) judges decree that "Mass Murder is Liberty," and

(2) the judges effect the killings by refusing to allow counsel to represent the victims to be killed; and

(3) the judges maintain the killings year after year, in the teeth of challenge, by repeatedly refusing to allow counsel

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1./ "Even judges ... could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242." Imbler v. Pachtman, 424 U.S. 409 (1976).

to represent the victims being killed to defend their right to life under the U.S. Constitution.

If this process were used to decree it "liberty" to deliberately kill Jews, it would rightly be condemned as murder. Judges might have more sympathy for another category of victims, but changing the name of the victims from "Jew" to "unborn" will not change the legal result.

Now a lawyer must try to prove that the most corrupt judicial process, which the human mind can imagine, is wrong.

But the lawyer cannot even be heard, because the Court will not allow counsel to represent the victims being killed and defend their right to life under the U.S. Constitution.

The U.S. Supreme Court is willfully maintaining these killings by refusing to allow truth to work in its Court. This is unconstitutional and criminal.

A 1

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The photograph, supra A-1, shows a second stage abortion by prostaglandin. Such abortions not uncommonly result in the child being born alive.1 This Court would be guilty of murder for such killing. There have been thousands of such killings under Roe v. Wade; and witnesses live to tell.

If the child were born dead, the Court would be guilty of criminal extermination.2

As the Court studies the face of this victim of Roe v. Wade, let it contemplate that a government of laws shall be restored, and call the killers to account.

1./ Floyd v. Anders, 440 F. Supp. 535, 538 (1977). There are about 140,000 second stage abortions each year. All the common second stage abortion techniques - hysterotomy, prostaglandin, and even salt poisoning - can result in the child being born alive. Jefferies and Edmonds, Abortion: The Dreaded Complication, The Philadelphia Inquirer, August 2, 1981.

2./ Since the universal words "any person," as used in the Fifth and Fourteenth Amendments, do include the unborn, their lives are also protected from judicial extermination by 18 U.S.C. § 242.

MOTION FILED
JUN 29 1985

No. 84-1379

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

EUGENE F. DIAMOND AND JASPER F. WILLIAMS

APPELLANTS

v.

ALLAN G. CHARLES, ET AL.

APPELLEES

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, WITH BRIEF AMICUS CURIAE, BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

The Court is moved for leave to file the attached brief amicus curiae by The Legal Defense Fund for Unborn Children.

The amicus brief is not in support of either party. The purpose of the amicus brief is to defend the constitutional right to life of the unborn, which the parties have not done.

The amicus demonstrates that Roe v. Wade, 410 U.S. 113 (1973) is a mistake of law.

Although amicus addresses no arguments to the issues raised by the parties, the facts and authorities presented by the amicus disposes of all the issues raised by the parties.

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Alan Ernest
Counsel

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1984

EUGENE DIAMOND AND JASPER WILLIAMS

v.

ALLAN G. CHARLES, ET AL.

AMICUS CURIAE BRIEF BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

INTEREST OF AMICUS CURIAE

The interest of the Legal Defense Fund For Unborn Children is to defend the right to life of unborn children under the U.S. Constitution. The parties have not done this. This brief does not support either party.

SUMMARY OF ARGUMENT

Roe v. Wade, 410 U.S. 113 (1973), is void. It is no law at all.

In Roe v. Wade, the Court decreed: "MASS MURDER IS LIBERTY." This is the ultimate lawless act. In his novel, "1984," Orwell described how a tyranny defrauded its

subjects into obedience with the "doublethink" slogan, "FREEDOM IS SLAVERY." Although this science fiction may appear improbable, the Supreme Court has defrauded this nation into obedience with the ultimate fraud, "MASS MURDER IS LIBERTY."

And due process of law has compelled the U.S. Supreme Court to admit in court that Roe v. Wade is void. This is the legal equivalent of the express overruling of Roe v. Wade by the Supreme Court.

Moreover, the universal words "any person," as used in the Fifth and Fourteenth Amendments to the U.S. Constitution, do include the unborn.

Roe v. Wade must be expressly overruled, so this national scheme of criminal extermination in violation of the U.S. Constitution can be stopped. This disposes of all the issues raised by the parties.

ARGUMENT

I.

ROE v. WADE IS VOID, BECAUSE THE SUPREME COURT HITLER-LIKE DECREED KILLINGS TO BE "LIBERTY" WHICH HAD BEEN DEMOCRATICALLY DEFINED TO BE "MURDER." THE DECREE THAT "MASS MURDER IS LIBERTY" IS THE ULTIMATE LAWLESS JUDICIAL ACT.

In Roe v. Wade, the Supreme Court decreed killings to be "liberty" which had been democratically defined to be "murder" since long before adoption of the Fourteenth Amendment.[1]

1./ When the Fourteenth Amendment was adopted, an abortion was murder if the child was "born alive." And a child could be "born alive" long before viability.

A. The English Common Law

The English common law, as stated in the works of Coke, (3 Inst. 50), Hawkins, (1 Hawkins Ch. 13, s. 16) and Blackstone, (4 Bl. Com. 198) defined an abortion, in which a "quick" child died after being "born alive," to be "murder."

Thus, under the common law, an abortion of an unviable child, a child too immature to survive outside the womb, who died after being born alive, was "so horrible an offense" and "this is murder." 3 Inst. 50.

Regina v. West, 2 C & K 784 (1848) followed Coke, Hawkins, and Blackstone, and ruled that an abortion was murder if the child

In 1857, the American Medical Association began a two year study of all the abortion laws in the United States. The 1859 report stated the law of murder throughout the United States, as follows:

> "If a person, intending to procure abortion, does an act which causes the child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it in a situation in which it cannot live, is guilty of murder." Reported in A.S. Taylor, infra page 7, at 462. (emphasis added)

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was born alive, even though the child died because it was too immature to survive outside the womb.

The indictment for murder alleged that the defendant had inserted a "certain pin ... upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Regina v. West, 2 C & K at 784-85. The child died shortly afterward. A "medical witness" had testified:

"[I]t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any

Yet, in 1973, this is the very killing which the U.S. Supreme Court decreed to be "liberty." See photo, infra A-1.

In the plainest terms, the U.S. Supreme Court decreed: "MASS MURDER IS LIBERTY."

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considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K at 786.

The judge, relying on Coke and Blackstone, instructed the jury that if the child were "born alive," the abortion was murder, even though the child were not viable:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.... I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes the child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Regina v. West, 2 C & K at 788.

The case of Regina v. West, supra, was

Many people would be astonished to learn that this case for the unborn is the very case they would have to present for themselves if their own right to life were challenged in a federal court.

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cited by the leading English writers as the correct statement of the law of murder. See, 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516 (Penrose Am. ed. 6th ed. 1866). An abortion which resulted in an unviable child being born alive was murder.

B. THE AMERICAN LAW OF MURDER IN 1868

The common law is the dictionary for the state and federal homicide statutes; American courts used it to construe the meaning of their murder statutes. Hamilton v. United States, 26 App. D.C. 382 (1905); Clarke v. State, 117 Ala. 1 (1898).

By the time the Fourteenth Amendment was adopted in 1868, the leading American legal authorities had specifically cited Regina v. West, supra, as the correct statement of the law of murder.

As Wharton explained the law, A Treatise on

For example, take almost any group of persons, such as the insane, or invalids, or Jews. Suppose it were claimed in federal court that it is "liberty" to deliberately kill members of these groups, as well as the unborn.

What factual, non-argumentative evidence

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the Law of Homicide in the United States 93 (1855):

"If a person intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

American authorities agreed that this was the correct statement of the law of murder. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, Manual of Medical Jurisprudence 462, 517 (Penrose Am. ed. 6th ed. 1866). This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.

C. THE LAW OF MURDER AND THE MEANING OF THE FOURTEENTH AMENDMENT

If the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant from its mother's

could be found to establish their right to life under the U.S. Constitution?

As the case for the unborn shows, it would do no good to object that no one ever heard of a "liberty" to deliberately kill the insane, or invalids, or Jews - or to object that such killings had thereto been defined as criminal.

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womb and leaving it to die, as murder, then it is certain that they did not intend to exclude the lives of these children from the protection of the Fourteenth Amendment so they could be deliberately killed with impunity from criminal statutes.

If the people who framed and adopted the Amendment had condemned the deliberate killing of Jews to be murder, it is certain that they did not intend to exclude Jews from the protection of the Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes. Changing the names of the victims does not change the legal result.

But by seizing upon viability, the Supreme Court decreed the same killing to be "liberty" which the American people had universally defined to be "murder." It is a naked decree without any investigation whatever into the law of murder. In its ignorance, the Court decreed: "Mass Murder is Liberty."

Since the universal words "any person" in

And the Fifth and Fourteenth Amendments merely state that they protect the life of "any person." So, as with the unborn, the Amendments do not expressly refer to the insane, or invalids, or Jews; and their legislative histories do not appear to specifically refer to the insane, or invalids, or Jews.

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the Fourteenth Amendment must include all persons whose lives were protected by the law of murder when the Amendment was adopted, the lives of these children were specifically guaranteed by the Amendment. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, then the lives of these children are still protected by the Fourteenth Amendment. Roe v. Wade is void.

D. THE HYSTEROTOMY ABORTION UNDER ROE v. WADE

A common way to perform abortions under Roe v. Wade is by hysterotomy. Commonwealth v. Edelin, 359 N.E. 2d 4 (Mass. 1976). A hysterotomy is essentially a caesarean, in which a live but unviable child is taken from the womb and left to die. HEARINGS ON THE PROPOSED CONSTITUTIONAL AMENDMENTS ON ABORTION, BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES,

As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; and their legislative histories, to the extent they have any, do not appear to specifically refer to these groups.

The principle in the Declaration of

94th Cong., 2d Sess., Ser. 46, Part 1, at 391 (1976).

As established by medical testimony at these 1976 House abortion hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive." Id., at 397.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder.

E. ROE v. WADE AND MISTAKE OF LAW

The constitutional provisions against ex post facto laws do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1913). And mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed 1969). The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft #4, Comments Sec. 2.04, at 138.

Since Roe v. Wade is a mistake of law, mass murder is being perpetrated in the United

Independence, that all people are "created" equal, and endowed with an unalienable right to life, having been sneered out of court in Roe v. Wade, now provides no assurance for anyone. The Court so perverted the Declaration of Independence as to amount to just this: "All men are created equal, except those created to be murdered for the convenience of others."

States under guise of law. The Roe v. Wade hysterotomy killings, by definition under the law of murder when the Fourteenth Amendment was adopted, and thus also constitutional law, violate the murder statutes throughout the United States.

The Supreme Court decreed mass murder to be liberty without any examination of the law of murder; it was a naked decree. And as Abraham Lincoln warned, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him. 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. 3 Wharton's Criminal Law and Procedure 673 (12th ed. 1957).

And year after year the U.S. Supreme Court has deliberately adhered to its decree that

So, what factual, non-argumentative evidence is there for the insane, or invalids, or Jews to protect themselves from a judicial decree that it is "liberty" to deliberately kill them with impunity from criminal statutes?

"Mass Murder is Liberty" in the very teeth of challenges that these children were being murdered in violation of the Constitution and laws of the United States, and of the States. See amicus curiae brief of The Legal Defense Fund for Unborn Children, filed in Akron v. Akron Center For Reproductive Health, 462 U.S. 416 (1983).

This is deliberation and premeditation unparalleled in the legal history of the world. The Justices responsible for these killing may be facing the death penalty in very many states.

It may be that the judges responsible for these murders did not believe that they were breaking the law. But, as Justice Oliver Wendell Holmes once wrote: "Ignorance of the law is no excuse for breaking it....It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (Little Brown paperback 1963).

Roe v. Wade is not going to protect one

The case for the unborn is the case for many others; it is this same body of factual evidence which many people must ultimately rely upon to establish that their right to life is protected by the U.S. Constitution.

If the people who framed and adopted the Fourteenth Amendment had condemned the deliberate killing of Jews to be "murder," then it is certain that they did not intend to exclude the lives of Jews from the

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single judge from the law of murder, because it is a mistake of law. Mass murder is not liberty. These children were murdered in violation of the Constitution and positive criminal statutes.

F. CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

Since the U.S. Constitution is "the supreme law of the land," and the evidence proves that the lives of these children are protected by the U.S. Constitution, Roe v. Wade is void.

protection of the U.S. Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes.

And merely changing the names of the victims would not change this conclusion.

Since the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant, whether viable or not, from its mother's womb and leaving it to die to be "murder," it is certain that the framers did not intend the Amendment to create a "liberty" to deliberately kill these children with impunity from criminal statutes. It is certain that the lives of these children are protected by the U.S. Constitution.

Since the right to life protected by the Constitution does not just disappear with time, as whitewash weathers off an aging fence, it is certain that the lives of these children are still protected by

the U.S. Constitution. And since the Constitution is the "supreme law of the land," it is certain that Roe v. Wade is void; it is not law.

The thousands of "born alive" abortions since 1973 can be prosecuted as murder.

If the Court had decreed it "liberty" to deliberately kill Jews, it would rightly be denounced as murder. Judges may have more sympathy for other victims, but changing the names of the victims from "Jew" to "unborn" will not change the legal result.

In his novel "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, yet, the U.S. Supreme Court has defrauded the American people into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

When judges decree that "MASS MURDER IS LIBERTY," then it can not be pretended that

it is any longer the government of the United States - or any government of constitution and laws.

Abraham Lincoln ridiculed the Dred Scott decision by reducing it to its plainest terms: "That if any one man, choose to enslave another, no third man shall be allowed to object."[2] In Roe v. Wade, the Court invented an even more astonishing falsehood, "That if any one man, choose to murder another, no third man shall be allowed to object."

The U.S. Supreme Court has Hitler-like asserted to legalize mass murder. By

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2./ 2 Collected Works of Abraham Lincoln 462 (Basler ed. 1953). In Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 451 (1857), the U.S. Supreme Court held that the word "person," as used in the Constitution, did not include Negroes. While the Court did not assert a "liberty" to deliberately kill Negroes, the Court did rule that "the right to property in a slave is distinctly and expressly affirmed in the Constitution," and Congress could not prohibit slavery in the federal territories.

changing the names of the victims, the Court has duplicated the conduct of "the supreme judge" of Nazi Germany.[3]

The evidence shows that the U.S. Supreme Court is committing mass murder under the guise of law; the dagger of the assassin has been concealed beneath the robe of the jurist. Roe v. Wade is void.

3./ The Nuremberg court described how Hitler was "the supreme judge" of Nazi Germany. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011 (1951). This "supreme judge" decreed deliberate killings to be legal which had been defined as criminal. At Nuremberg, the Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted within the authority of the decrees of "the supreme judge." United States v. Altstoetter, supra, 983-85. But the Nuremberg Court held, "The dagger of the assassin was concealed beneath the robe of the jurist." United States v. Altstoetter, supra, 985.

By changing the name of the victims from "Jew" to "unborn," the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany. But changing the name of the victims will not change the legal result. Roe v. Wade is murder.

II.

ROE v. WADE IS VOID BECAUSE THE COURT USED FALSE EVIDENCE, AND UNCONSTITUTIONAL BURDENS OF PROOF, TO INFER THAT "THE WORD 'PERSON,' AS USED IN THE FOURTEENTH AMENDMENT, DOES NOT INCLUDE THE UNBORN." THE UNIVERSAL WORDS "ANY PERSON," AS USED IN THE CONSTITUTION, DO INCLUDE THE UNBORN.

The Court used fabricated evidence in Roe v. Wade, and unconstitutional burdens of proof and persuasion, to infer "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."

The evidence proves that the universal words "any person," as used in the Amendment, do include the unborn.

A.

The Court admitted that if the unborn were "a 'person,' within the language and meaning of the Fourteenth Amendment," then the case for a "liberty" to kill the unborn, as claimed in Roe v. Wade, "of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." Roe v.Wade, 410 U.S. at 156-157.

B.

The terms of the Fourteenth Amendment ("nor shall any state deprive any person of life ... without due process of law") (emphasis added) are "universal in their application, to all persons ... without regard to any differences." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). The universal words "any person" make no distinction between born and unborn persons, and on their face admit of no exceptions whatever. Thus, on their face, the universal words "any person" include the unborn, as everyone else.

C.

The holdings of Chief Justice John Marshall prove that the Supreme Court has no lawful power to construe an exception to universal terms, such as "any person," unless:

1. the Court can show that "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all

mankind would, without hesitation, unite in rejecting the application";1 and

2. the Court can prove that "had this particular case been suggested [to the framers], the language would have been so varied, as to exclude it, or it would have been made a special exception."2

Chief Justice Marshall founded the universality of the Supreme Court's jurisdiction on these very rules.3

1./ Sturges v. Crowninshield, 4 Wheat. 122, 203 (1819). Before the Court can exclude the unborn from the universal words "any person," so they can be deliberately killed with impunity from criminal statutes, the Court must prove that including the unborn, within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

2./ Dartmouth College v. Woodward, 4 Wheat. 518, 644 (1819). The Court had to prove that if the case of the unborn had been suggested to the Framers, they would have changed the Amendment to read: "Nor shall any state deprive any person, except unborn persons, of life ... without due process of law."

3./ Cohen v. Virginia, 6 Wheat. 264, 378-380, 422-423 (1821).

The Court bore an extraordinary burden before it could imply an exception to the universal terms "any person" so millions of persons could be deliberately killed with impunity from criminal statutes.[4]

4./ The truth of this extraordinary burden can be demonstrated by applying it to various cases. Before the Court can imply an exception to the universal terms "any person," so that Jews could be deliberately killed with impunity from criminal laws, the Court would have to prove that "the absurdity and injustice" of including Jews within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, supra. And the Court must prove that if the case of the Jews had been suggested to the framers of the Fourteenth Amendment, "the language would have been so varied, as to exclude it." Dartmouth College v. Woodward, supra. The framers would have changed the Amendment to read: "No state shall deprive any person, except Jews, of life without due process of law."

These same burdens must apply to anyone whose personhood may be challenged, including the unborn. Thus, the Court bore the heaviest burden in constitutional interpretation in order to imply an exception to the universal terms "any person" so that millions of unborn children could be deliberately killed with impunity from positive criminal statutes.

D.

The Supreme Court fabricated false evidence in Roe v. Wade to imply that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[5]

5./ SUMMARY OF FALSE EVIDENCE
When the Fourteenth Amendment was adopted in 1868, over three-fourths of the ratifying states had already enacted criminal statutes which made abortion at any stage of gestation a crime unless it were necessary to save the life of the mother or child. Within a few years, these statutes were universal.

In those few states still controlled by the common law on abortion, it is not possible to state with any assurance that the law was any different than in those states with abortion statutes. Some state supreme courts had ruled that the common law made abortion a crime throughout gestation. Mills v. Comm. 13 Pa. 631 (1850); State v. Slagle, 83 N.C. 544 (1880); State v. Reed, 45 Ark. 333 (1885). And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately overruled by their legislatures which made abortion at any stage of pregnancy a crime. Comm. v. Parker, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). State v. Cooper, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). Abrahams v. Foshee, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

[continued on next page]

The people who framed and adopted the Fourteenth Amendment had already democratically defined the deliberate killing of the unborn to be a crime. The Supreme Court knew it could not imply an exception to the universal terms "any person" to decree "MASS EXTERMINATION, DEMOCRATICALLY DEFINED TO BE CRIMINAL, IS LIBERTY." So the Supreme Court fabricated evidence to make it appear that those 19th century abortion statutes were not intended

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Any theory of a "liberty" to deliberately kill the unborn faced an impossible contradiction: How was it possible that the people who adopted the Fourteenth Amendment had enacted criminal statutes to protect the lives of the unborn, but at the same time, without a single word of explanation, intended to imply an exception to the universal terms "any person" so there would be a "liberty" to deliberately kill the unborn with impunity from their criminal statutes? This absurd contradiction wrecks Roe v. Wade.

To resolve this fatal contradiction, the Court fabricated the hypothesis that when the criminal abortion statutes were first enacted, the laws were not intended to protect the unborn life, but were only

to protect the lives of the unborn. The purpose of the falsification was to make it appear that this nation had always deemed abortion to be "liberty," and not crime. The Supreme Court perpetrated the Orwellian crime of falsifying the legal history of the United States to make criminal extermination appear to be "liberty."

If the Court had decreed it "liberty" to deliberately kill Jews, and fabricated evidence to make it appear that the American people had always deemed it

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intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

A.

The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v. Wade, 410 U.S. at 148. This is asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, A Hundred Years of Medicine 19 (1943), cited in Roe v. Wade, supra, at 148 n. 43. But, this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The book did not even mention

liberty, and not crime, to kill Jews, then it would rightly be condemned as murder. Judges might have greater sympathy for other victims, but changing the name of the victims from "Jew" to "unborn" will not change the legal result.

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the abortion operation.

The 19th Century obstetric authorities throughout the Western world prove the Court's assertion of fact to be false.

These 19th century obstetric authorities, based on their own experience in performing abortion, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802) (English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th American ed. 1852); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864)(American physician). The 19th century obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th

The lives of the unborn must be protected by the Fourteenth Amendment. The framers used the universal terms "any person," without any exceptions. And no exception may be implied. The people had already enacted criminal statutes to protect the

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century physicians generally used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, at 99. One 19th century physician traced this operation back almost 2000 years. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

Consequently, the 19th century physicians were generally using an ancient abortion procedure which they described as not hazardous to the life of the woman.

The Supreme Court did not examine even one single 19th century obstetric textbook. And the medical textbooks prove its assertion of fact, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman," to be false.

Since abortion was not dangerous to the life of the mother, the only motivating purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortion, even safe abortions by physicians. Had it been the purpose of the legislators to only protect

lives of the unborn. No court can imply an exception to the universal terms "any person" to decree: "MASS EXTERMINATION, DEMOCRATICALLY DEFINED TO BE CRIMINAL, IS LIBERTY." So the universal words "any person," as used in the Fourteenth Amendment, do include the unborn.

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the mother, they would have only required abortions to be performed by physicians, which were known all over the western world to be safe to the mother.

B.

The Supreme Court next asserted: "Abortion mortality was high." Roe v. Wade, 410 U.S. at 149. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities prove this assertion of fact to be false. The medical authorities expressly asserted that the abortion operation was not hazardous to the life of the mother.

The purpose of this assertion is to go beyond the mere theory that abortion was hazardous to the mother, and imply that the carnage was so great as to call for legislation to protect mothers from the medical profession.

But the obstetric texts prove the Court's assertion, "Abortion mortality was high,"

E.

Not only are indispensable parts of the Supreme Court's evidence fabricated and false, but the Court also unconstitutionally reversed the burdens of proof and persuasion, as set out in the rulings of Chief Justice John Marshall.

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to be a false statement of fact.

C.

Upon these two false assertion of fact, the Court falsely infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v. Wade, 410 U.S. at 149. This is a false inference, drawn from false assertions of fact.

Moreover, the 19th century treatises on criminal law state that these criminal abortion laws were intended to protect the lives of the unborn. 2 F. Wharton, A Treatise on the Criminal Law of the United States 200-203 (7th ed. 1874). There is none to the contrary. If the purpose of these laws had been to protect the mother, and not the child, these writers would certainly have noted it.

Since abortions by physicians were known all over the western world to be safe to the mother, the motivating purpose of these abortion laws could only have been to protect the lives of unborn children from

Instead of placing the burden on the advocates of the killings to prove that including the unborn within the universal terms "any person" would "be so monstrous, that all mankind would, without hesitation, unite in rejecting the application," the Court unconstitutionally reversed the burdens of proof and persuasion. The Court

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destruction from abortions. That legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals, shows their great respect for unborn life.

D.

From the false inference that the criminal abortion laws were not intended to protect the lives of the unborn, the Court falsely inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. at 158. This false conclusion is drawn from a false inference which is drawn from false facts.

Conclusion

The Supreme Court bore the burden of proving that the absurdity and injustice of including the unborn within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, supra. And the

placed the burden on the unborn to prove with "assurance" (which means to make certain and put beyond doubt) that they were persons within the universal words terms "any person," or the unborn would be excluded from the terms "any person" so they could be deliberately killed with impunity from criminal statutes.

The Court reversed the burdens of proof

Court had to prove that if the case of the unborn had been presented to the framers and adopters of the Fourteenth Amendment, "the language would have been so varied, as to exclude it." Dartmouth College v. Woodward, supra.

But, the Court could not cite even one 19th authority that expressly agreed with its conclusion that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," much less one who asserted that there was a "liberty" to deliberately kill the unborn with impunity from criminal statutes.

The legal history demonstrates that the people did intend the Amendment to protect the unborn: they used universal language most appropriate for the purpose; and, the people had already enacted criminal abortion laws to protect the unborn in fact. The universal words "any person," as used in the Fourteenth Amendment, must include the unborn.

in the following manner:

First, the Court declared a "liberty" to deliberately kill the unborn with impunity from criminal statutes.[6]

Second, subsequently, the Court looked to see if the lives of the unborn were protected by the Fourteenth Amendment.[7]

Third, the purpose of first decreeing a "liberty" to deliberately kill the unborn, before the Court even looked to see if the lives of the unborn were protected by the Constitution, was to impose the "compelling state interest" test on the unborn. This placed a very heavy burden on the unborn

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6./ Roe v. Wade, 410 U.S. at 153.

7./ Roe v. Wade, 410 U.S. at 156-157. The Court assumed the very thing which was to be proved by evidence. By the Court's own admission, if the lives of the unborn were protected by the Fourteenth Amendment, then the alleged "liberty" to kill the unborn "of course, collapses." But, the Court decreed a "liberty" to kill the unborn, before it even looked to see if their lives were protected by the Constitution. It is analogous to a court finding an accused to be guilty before it heard the evidence.

to prove that their right to life was protected by the Constitution.[8]

Fourth, the Court stated that the evidence did not prove "with any assurance" that the lives of the unborn were protected by the U.S. Constitution.[9] This confirms that the Court placed the burden on the unborn to prove with "assurance" that their lives are protected by the Constitution.

Finally, the Court ruled that the unborn had not met their burden of proof and the unborn could be deliberately killed with impunity from criminal statutes.

This process is analogous to a court first adjudging the accused in a criminal

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8./ Roe v. Wade, 410 U.S. at 156. As its compelling state interest, Texas claimed that the lives of the unborn were protected by the Fourteenth Amendment, and that the purpose of their abortion statute was to protect the lives of the unborn. Thus, a heavy burden of proof was placed on the defenders of the abortion statute to prove that the universal words "any person," as used in the Fourteenth Amendment, do include the unborn.

9./ Roe v. Wade, 410 U.S. at 157.

case to be guilty, before it even heard the evidence, then placing the burden on the accused to prove himself innocent beyond a reasonable doubt, or be hanged.

The burdens used in Roe v. Wade are unconstitutional, and savagely criminal.

If the Court first decreed a "liberty" to kill Jews, and then placed the burden on the Jews to prove with "assurance" that their lives were protected by the U.S. Constitution, it would rightly be condemned as murder. Judges may have more sympathy for other victims, but changing the name of the victims being killed from "Jew" to "unborn" will not change the legal result.

Rather, under the rulings of Chief Justice Marshall, the burden was on the Court to prove with "assurance" that the unborn were not included within the universal terms "any person," or they would be included.

The evidence for the unborn is far

stronger than for other groups which the Court has judicially recognized to be included within the terms "any person."[11]

The U.S. Supreme Court has defied the express words "any person" in the Fourteenth Amendment, and their spirit,[12]

11./ The Court was so sure that "corporations" were included within the universal terms "any person" that it forbade any oral argument to the contrary. Santa Clara v. So. Pac. RR, 118 U.S. 394, 396 (1886). And the Court held that "strangers and aliens" were included within the terms "any person" by merely observing: "These provisions are universal in their application." Yick Wo v. Hopkins, supra, at 369. No evidence whatever was required.

12./ The uncontradicted scientific medical evidence in Roe v. Wade showed that the unborn child is "alive." The heart begins "pulsations at 24 days." And "brain waves have been noted at 43 days."

The Court has recognized that, while the Declaration of Independence is not law in itself, yet it is "the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." Gulf, Colo. & S. Fe Ry v. Ellis, 165 U.S. 150, 159-160 (1896).

The undisputed scientific evidence proved that the unborn child has been "created" and thus endowed with an "unalienable" right to "life." Thus, the universal terms

and the plain intention of its framers and adopters,[13] and condemned to death millions of victims whom the Constitution of the United States endeavors to preserve.

The evidence proves that the universal words "any person," as used in the Fourteenth Amendment, do include the unborn.

And the universal words "any person," as used in the Fifth Amendment, must also

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"any person," as used in the Amendment, must also include the unborn. The right to life of the unborn is guaranteed, not just by the spirit of the Declaration of Independence, but by the express words of the U.S. Constitution.

Roe v. Wade corrupted the Declaration of Independence to read: "All men are created equal,- except those created to be killed for the convenience of others."

13./ The people who adopted the Fourteenth Amendment not only used the express and universal terms (not "any person" could be deprived of life without due process of law) without any distinction between born or unborn life, but those people had already enacted criminal abortion statutes to protect the lives of the unborn in fact.

include the unborn.[14]

And the unborn are also protected from judicial extermination by 18 U.S.C. § 242.[15]

Since the U.S. Constitution is "the supreme law of the land," and its universal terms "any person," as used in the Fifth

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14./ As the Court reasoned in Bolling v. Sharpe, 347 U.S. 497 (1954), if the Fourteenth Amendment prohibits racially segregated schools in the States, then it would be "unthinkable" that the Fifth Amendment permitted them in the District of Columbia. By the same reasoning, since the killings are prohibited in the states by the Fourteenth Amendment, it is "unthinkable" that the Fifth Amendment could permit them in the District of Columbia. Regardless of the evidence relevant to the Fifth Amendment, the purpose of a subsequent amendment is to amend. Hunter v. Underwood, __ U.S. __, 85 L Ed 2d 222, 231 (1985).

15./ The history of 18 U.S.C. § 242 shows that it was intended to protect all persons whose lives were guarded by the Fourteenth Amendment. Screws v. United States, 325 U.S. 91, 98 (1944). Since the universal words "any person," as used in the Fourteenth Amendment, do include the unborn, their lives are also protected by 18 U.S.C. § 242. "Even judges ... could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242." Imbler v. Pachtman, 424 U.S. 409 (1976), 47 L Ed 2d 128, 142 (1976).

and Fourteenth Amendments, do indisputably include the unborn, it is also indisputable that Roe v. Wade is unconstitutional and void. Roe v. Wade is no law at all.

And any judge who follows Roe v. Wade, and permits the killings to continue, will be guilty of complicity in a national scheme of criminal extermination in violation of the Constitution and laws of the United States.[16]

16./ Since 18 U.S.C. § 242 protects the lives of the unborn from extermination by federal judges, any judge who willfully permits these Roe v. Wade killings to continue can be prosecuted for complicity in a national scheme of extermination, in violation of the Constitution and laws of the United States. And the death of each unborn child can be punished with life imprisonment. Since judges have willfully exterminated millions of victims by Roe v. Wade, judicial liability under this one statute is unparalleled in the legal history of the world.

III.

ROE v. WADE IS VOID BECAUSE THE SUPREME COURT USED UNCONSTITUTIONAL AND CRIMINAL PROCEDURES TO EFFECT AND MAINTAIN THE ROE v. WADE KILLINGS.

The Supreme Court willfully used unconstitutional procedures to effect the Roe v. Wade killings.[1]

1./ The Court willfully used the following unconstitutional procedures, despite objection, to effect Roe v. Wade:

A. Denial of Assistance of Counsel

Counsel did not especially represent the unborn in the District Court in Roe v. Wade. And the Supreme Court denied a request by an original party to allow counsel to especially represent the unborn in the Supreme Court. Thus, counsel did not represent the unborn at any stage of the original proceedings.

B. Denial of Prior Notice

The District Court did not even look to see if the lives of the unborn were protected by the U.S. Constitution; this question was argued for the first time after the case reached the Supreme Court. And the Supreme Court gave the parties no prior notice of the constitutional standards, or the burdens of proof, or the evidence, which the Court used to infer that the lives of the unborn were not protected by the Constitution. The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn.

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And the Supreme Court subsequently decided many abortion cases on the merits, but, despite objection that the process was unconstitutional and criminal, willfully used unconstitutional procedures to maintain the Roe v. Wade killings:

1. The Supreme Court willfully refuses to allow retained (no cost to taxpayers)

C. Secret Evidentiary Proceedi.
The Court used some secret evidentia. process, not open to the parties, to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected that it had not had opportunity to cross-examine the Court's evidence in a judicial proceeding.

D. Denial of Right to Cross-Examine
An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the Constitution. But the Supreme Court would not allow its evidence to be cross-examined.

E. Denial of Right to Present Evidence
An original party asked permission to present evidence under the new constitutional standards which it had not seen before to show that the lives of the unborn are protected by the Constitution. But the Court refused to allow it. And the killings commenced.

counsel to represent the victims being killed;[2]

2. The Supreme Court willfully refuses to allow its evidence in Roe v. Wade, which it used to infer that the lives of the unborn are not protected by the U.S. Constitution,

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2./ Some of the cases are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel to represent the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel to represent the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel to represent the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel to represent the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel to represent the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel to represent the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel to represent the unborn denied 445 U.S. 959; Simopoulos v. Virginia, __ U.S. __, 76 L Ed 2d 755, motion to allow counsel to represent the unborn denied 73 L Ed 2d 1364; Planned Parenthood of Kansas City v. Ashcroft, __ U.S.__, 76 L Ed 2d 733, motion to allow counsel represent the unborn denied 73 L Ed 2d 1364; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel to represent the unborn denied 73 L Ed 2d 1364.

to be confronted and cross-examined;[3]

3. The Supreme Court willfully refuses to allow evidence to be presented on behalf of the victims being killed to establish their right to life under the U.S. Constitution.[4]

The Supreme Court's own rulings on due process of law show these procedures to be unconstitutional.[5]

3./ See cases, supra note 2. The evidence in Roe v. Wade, used to infer that the lives of the unborn are not protected by the Constitution, has never been cross-examined, despite the charge that the Court fabricated its evidence.

4./ See cases, supra note 2.

5./ Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970); In Re Gault, 387 U.S. 1 (1967).

If the Constitution would not permit a court to condemn even one single Jew to death in a criminal case, but deny all these procedural rights, then neither can any court condemn any or all Jews in the United States to death, but deny all these procedural rights, by calling it a

Since the deprivation was willful, these procedures are also criminal.[6]

These are essentially the same procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of

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civil proceeding, and decreeing that the lives of Jews are not protected by the U.S. Constitution, and it is "liberty" to deliberately kill Jews with impunity from criminal statutes.

If the process used to effect and maintain the Roe v. Wade killings, were used to decree it "liberty" to kill Jews, it would rightly be denounced as murder. But changing the names of the victims being killed, does not change the legal result.

Any victim is entitled to all the procedural protections described in Goldberg v. Kelly, supra, before any court can decree that the victim's life is not protected by the U.S. Constitution, and the victim can be deliberately killed with impunity from criminal statutes.

6./ "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976). The deprivation was willful because the Court repeatedly denied all these procedural rights in the teeth of the objection that the denial was unconstitutional and criminal. Thus the deprivation of these procedural rights was criminal.

complicity in extermination and murder.[7]

If the Supreme Court had used these procedures to decree it "liberty" to deliberately kill Jews, it would rightly be condemned as murder. While judges may have more sympathy for another category of victims, changing the names of the victims from "Jew" to "Unborn" will not change the legal result.

Having decreed that "MASS MURDER IS LIBERTY," the Court now maintains the killings by criminally refusing to allow truth to work in its Court.

It is notorious that truth is not permitted to work in the proceedings in the U.S. Supreme Court, and that the Court

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7./ "In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel... (T)he accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried." United States v. Altstoetter, supra, at 1046-47 (1951).

falsifies history to achieve its ends.[8]

The Supreme Court has made a murderous mockery of due process of law.

The use of these procedures, to exclude millions of victims from the protection of the U.S. Constitution, so they can be deliberately killed with impunity from criminal statutes, is unconstitutional, and makes Roe v. Wade void.

8./ "The Court... has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design .... Such conduct impels one to conclude that the Justices are become a law unto themselves. ... It perilously resembles ... Hitlerism." R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 408, 412 (Harvard Univ. Press 1977).

"Court had adjourned in the real world.... (T)hey [the Justices] began to invent a country suited to their purposes.... They have falsified the American past ... and no one in charge seems prepared to do anything about it." T. Landers, To A Traditionalist, Mr. Ron Sounds So Good, The Wall Street Journal, editorial page, December 27, 1984.

IV.

DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND TO ADMIT THAT ROE v. WADE, 410 U.S. 113 (1973), IS VOID.

For the 87th time, the U.S. Supreme Court is accused in its own court with criminally exterminating millions of victims in violation of the U.S. Constitution, and 18 U.S.C. § 242.[1]

For the 63rd time, the U.S. Supreme Court is accused in its own court with mass murder in violation of state and federal statutes;[2]

For the 67th time, the U.S. Supreme Court is accused in it own Court of using unconstitutional and criminal procedures to effect and maintain the Roe v. Wade killings.[3]

But, the U.S. Supreme Court has never denied the charges, much less attempted to

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1./ Charges based on evidence, supra p. 3.

2./ Charges based on evidence, supra p. 18.

3./ Charges based on evidence, supra p. 38.

prove the charges to be false.

These facts are unparalleled in the legal history of the world.

Under this Court's own rulings, its silence year after year, while the victims are being killed, is an admission that the charges are true.[4]

> "Failure to contest an assertion, however, is considered evidence of

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4./ Under "the tacit confession rule," McCormick on Evidence, § 161, 270, failure to deny a charge is tantamount to a confession that the charge is true. Also 4 Wigmore, Evidence, § 1071-1072 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick, supra, § 161. The Supreme Court has consistently affirmed this rule. "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). And the rule is ancient. As Socrates cross-examined at his trial over 2000 years ago: "you are silent and have nothing to say. But is this not rather disgraceful, and a very considerable proof of what I was saying?" "I may assume that your silence gives consent." Apology in Plato 41, 45 (Jowett transl. 1942).

> acquiescence only if it would have been natural under the circumstances to object to the assertion in question." United States v. Hale, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that due process of law has compelled the U.S. Supreme Court to confess that the charges are true, and that Roe v. Wade is void.

First, the evidence makes it clear as daylight why the Court is silent in the face of the charges: the charges are proved to be true.[5] No denial is possible.

Second, the charges were made in cases filed pursuant to the Constitution and laws of the United States. The judges had a legal duty to attend to allegations that Roe v. Wade was wrongly decided:

> "(I)ts opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its

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5./ The Supreme Court decreed killings to be "liberty" which the people had democratically defined to be "murder." This is mere historical fact; no denial is possible. The decree that "Mass Murder is Liberty" is the ultimate lawless act.

> judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." The Passenger Cases, 7 How. 282, 470 (1849).

In view of their oath, when judges "close their eyes on the Constitution", and "condemn to death those victims whom the Constitution endeavors to preserve," it is worse than solemn mockery, it is "crime."[6]

6./ Marbury v. Madison, 1 Cranch 137, 179-180 (1803). Chief Justice John Marshall wrote that for judges to swear to support the Constitution as the supreme law of the land, but then "close their eyes on the constitution," and "condemn to death those victims whom the Constitution endeavored to preserve" was worse than "solemn mockery," it is a "crime."

Where there is an affirmative duty to act, the deliberate omission to do that duty, which results in death to others, can be prosecuted as homicide. Perkins, Criminal Law 604 (2nd ed. 1969).

The only Nazi to plea guilty at Nuremberg cited this law. When he was warned of Auschwitz, Speer wrote that "I did not investigate - for I did not want to know what was happening there.... [F]rom fear of discovering something which might have made me turn from my course, I closed my eyes." A. Speer, Inside the Third Reich 375-76 (1970). This "deliberate blindness" was complicity in criminal extermination.

Federal judges are guilty of crime when

Third, the Court's steadfast silence, year after year, in the face of the scores of accusations that it is guilty of mass murder, is unparalleled in the legal history of the world, and it is the very circumstance which the Court itself has cited as making confession by silence more trustworthy.[7]

Fourth, not only has the Court's silence persisted in the face of repeated accusations, but the Court's silence has persisted even in the teeth of warnings that under its own rulings, its silence in the face of the charges was being taken as an admission that the charges are true, and

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they close their eyes on the evidence, and permit victims to be executed, whom the Constitution endeavors to preserve.

7./ Concerning the Court's continuing silence year after year: "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. 171, 176 (1975).

Roe v. Wade is a mistake of law.[8]

Fifth, the charges described the most corrupt judicial system which the human mind can imagine, that:

(1) judges had criminally exterminated millions of children in violation of the Constitution and laws of the United States, and of the States;

(2) the United States was being ruled over by a tribunal of murderers;

(3) due process had compelled the tribunal of murderers to confess in its own court to guilt of mass murder; and

(4) the tribunal of murderers was maintaining its murders by keeping truth from working in the courts of the United States.

8./ "THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v. WADE." Amicus curiae brief by the Legal Defense Fund For Unborn Children, filed in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

Never in the legal history of the world was it more imperative to deny charges if they were untrue.

Thus, when judges, under solemn legal duty to uphold the law, are accused of mass murder in their own court year after year, and the evidence is laid out in court, and pictures of the dead are shown to the judges, but year after year, while the victims are being killed, the judges do not deny the charge, much less attempt to prove it false, then not only a 2000 year old law of evidence, but the solemn legal duty imposed by a government of laws, condemns this silence as a confession that the charge is true; and their decree is void.

The immediate practical result is that due process has compelled the U.S. Supreme Court to admit that Roe v. Wade is a mistake of law. Truth has worked in the U.S. Supreme Court in the only manner in which it was permitted to work. Under our

government of laws, the Supreme Court was met in court with the truth, and due process has compelled the Court to admit, in the most emphatic manner which the human mind can imagine, that Roe v. Wade is void.

Any judge of the United States who closes his eyes on these facts, unparalleled in the legal history of the world, and permits the Roe v. Wade killings to continue, knows he is guilty of complicity in criminal extermination, including mass murder, in violation of the Constitution and laws of the United States, and of the States.[9]

9./ The Supreme Court asserted to legalize killings which had been defined as criminal by positive statutes. Since Roe v. Wade is a mistake of law, all the killings since 1973 can be criminally prosecuted. The ex post facto provisions of the Constitution do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1913). The general rule is that mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed. 1969). The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not

In the face of facts unparalleled in the legal history of the world, our government of laws will permit only one conclusion: the U.S. Supreme Court was met in court with the truth, and due process

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apply to homicide cases. Model Penal Code, Tentative Draft No. 4, Comments Sec. 2.04, page 138. Perkins, supra, at 928.

Thus, the law applied at Nuremberg applies to this case. Obedience to the unlawful orders of judicial superiors is no excuse for complicity in criminal extermination. United States v. Altstoetter, supra, at 983-985 (1951).

The Nuremberg court described how "the supreme judge" of Nazi Germany had decreed criminal killings to be legal. At Nuremberg, the Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, because they were bound to obey the decrees of "the supreme judge." But the Nuremberg court rejected that defense since obedience to the orders of superior judges is no defense in homicide cases: "The dagger of the assassin was concealed beneath the robe of the jurist." United States v. Altstoetter, supra, at 985.

To illustrate the true status of Roe v. Wade, suppose a lawyer had accused "the supreme judge" of Nazi Germany of mass murder 50 times in court, but the "supreme judge" never denied the charge, much less attempted to prove it false, and permitted the killings to continue. Could any court,

of law compelled the Supreme Court to admit, in the most emphatic manner which the human mind can imagine, that Roe v. Wade is unconstitutional and void.

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called upon to try the Nazi judges for complicity in murder, have permitted those judges the defense that the silence of "the supreme judge" proved that the killings were lawful? That such silence proved the Nazi judges could permit the killings to continue without question? This is too criminally monstrous for any sane person to dare to insist upon.

The law makes a mortal distinction between killing and not killing which no judge can safely ignore:

1. Any judge who stops the Roe v. Wade killings, and makes a mistake of law, can only be overruled on appeal;
2. But any judge who allows the killings to continue, despite the objection that the Supreme Court decreed "Mass Murder Is Liberty," and makes a mistake of law, can be prosecuted for complicity in mass murder, and be sentenced to death.

The law of capital murder is a hard school, where lessons are taught only one time, and mistakes of law are not forgiven.

Due process has compelled the Supreme Court to overrule Roe v. Wade. Any judge who elects to ignore the facts and take part in a national scheme to mass murder little children, rather than to allow truth to work in court, must deliberately hazard the death penalty. Many states still punish mass murder with the death penalty.

CONCLUSION

The amicus demands that the Court expressly overrule Roe v. Wade, and stop the killings which it perpetrated.

Due process of law has already compelled the U.S. Supreme Court to admit that Roe v. Wade, 410 U.S. 113 (1973), is void.

The U.S. Supreme Court has perpetrated one of the giant criminal exterminations in the peacetime history of the world.

Since the limited affirmative defense of reasonable reliance on an official judicial decision, thereafter determined to be a mistake of law, does not apply to homicide cases, the court should expressly overrule Roe v. Wade, not only to stop the killings, but also to protect unsuspecting persons from taking part in murder and criminal extermination, and sharing the Court's awesome criminal liability.

_____

Alan Ernest, Counsel

A 1

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The photograph, supra A-1, shows a second stage abortion by prostaglandin. Such abortions not uncommonly result in the child being born alive.1 This Court would be guilty of murder for such killing. There have been thousands of such killings under Roe v. Wade; and witnesses live to tell.

If the child were born dead, the Court would be guilty of criminal extermination.2

As the Court studies the face of this victim of Roe v. Wade, let it contemplate that a government of laws shall be restored, and call the killers to account.

1./ Floyd v. Anders, 440 F. Supp. 535, 538 (1977). There are about 140,000 second stage abortions each year. All the common second stage abortion techniques - hysterotomy, prostaglandin, and even salt poisoning - can result in the child being born alive. Jefferies and Edmonds, Abortion: The Dreaded Complication, The Philadelphia Inquirer, August 2, 1981.

2./ Since the universal words "any person," as used in the Fifth and Fourteenth Amendments, do include the unborn, their lives are also protected from judicial extermination by 18 U.S.C. § 242.

(8)

No. 84-1379

Office-Supreme Court, U.S.
FILED
JUL 15 1985
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

Eugene F. Diamond, M.D. and
Jasper F. Williams, M.D.,
Appellants,
vs.
Allan G. Charles, M.D., et al.,
Appellees,
and
The Hope Clinic for Women, Ltd., et al.,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1379

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,
Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,
Appellees,

and

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

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DATE	PROCEEDINGS
10-31-79	Affidavits of Allan G. Charles, M.D., Louis Gerald Keith, M.D., David Zbaraz, M.D., and Hector N. Zevallos, M.D., filed.
11-7-79	Affidavits of Joseph T. Gallagher, M.D., and Thomas G. Gorman, M.D., filed.
11-9-79	Affidavit of Martin Motew, M.D., filed.
11-19-79	By FLAUM, J - Memorandum Opinion dated November 16, 1979, granting in part and denying in part plaintiffs' motion for preliminary injunction.
7-9-82	Affidavits of Diana Shark, Mary Christine Gaspar, Debra Elrod Evans, and Jasper F. Williams, M.D. filed.
7-29-83	Defendant Richard M. Daley's adoption of motion for summary judgment and supporting brief of intervening defendants.
7-29-83	Defendants Hartigan and Kempiners' adoption of supplemental brief of intervening defendants.

DATE	PROCEEDINGS
10-6-83	Intervening defendants' motion to permit filing of supplemental brief and to set briefing schedule.
10-17-83	By KOCORAS, J - order dated October 5, 1983, denying intervening defendants' motion to permit filing of supplemental brief and to set briefing schedule.
10-27-83	Plaintiffs' motion to amend judgment of October 14, 1983, filed.
10-31-83	Intervening defendants' memorandum in support of the constitutionality of section 6(4) of the Illinois Abortion Law of 1975 filed.
11-9-83	By KOCORAS, J - order dated November 2, 1983, amending the judgment dated October 14, 1983.
11-2-83	By KOCORAS, J - amended opinion [reported at 579 F.Supp. 464 (1984)].
12-2-83	Intervening defendants Eugene F. Diamond, M.D. and Jasper F. Williams, M.D.'s notice of appeal from the October 14, 1983, and November 2, 1983, orders filed.

DOCKET ENTRIES

DATE	PROCEEDINGS
12-16-83	Plaintiffs' notice of cross-appeal from the November 2, 1983, order filed.
1-18-84	Letter from appellee Richard M. Daley to adopt brief of Eugene Diamond, M.D. and Jasper F. Williams, M.D. filed.
1-26-84	Letter from defendant-appellant Neil F. Hartigan adopting brief of intervening defendants-appellants filed.
8-6-84	Appellants cross-appellees' judicial notice per C.R. 11 filed.
11-30-84	By PELL, J - final judgment, affirmed in part and reversed in part.
11-30-84	By PELL, J - opinion.

The following opinions, decisions, judgments, and orders have been omitted in printing this Appendix because they appear on the following pages in the Appendix to the printed Jurisdictional Statement:

Opinion of the Court of Appeals
for the Seventh Circuit,
dated November 30, 1984.....A1
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for the Seventh Circuit,
dated November 30, 1984.....A50

The following opinions, decisions, judgments, and orders have been omitted in printing this Appendix because they appear on the following pages in the Appendix to the Plaintiffs' Motion to Dismiss or Affirm:

Opinion of the District Court,
Northern District of
Illinois, dated November
16, 1979.....1a

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALLAN G. CHARLES, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4541
BERNARD CAREY, et al.,	)	
Defendants.	)	
THE HOPE CLINIC FOR WOMEN, LTD., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4548
WILLIAM J. SCOTT, et al.,	)	
Defendants.	)	Judge Joel M. Flaum

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

ALLAN G. CHARLES, M.D.

ALLAN G. CHARLES, M.D., being duly sworn, deposes and states as follows:

1. I received my M.D. degree in 1952 from the New York University College

of Medicine and am a registered and licensed physician in the State of Illinois. I am actively engaged in the practice of obstetrics and gynecology and am currently a member of the Department of Obstetrics and Gynecology at Michael Reese Hospital, Chicago, Illinois, and am clinical professor of obstetrics and gynecology at the University of Chicago. I am a Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetrics and Gynecology. I am a member of the American Medical Association, the Illinois Medical Society and the Chicago Medical Society. I have researched and published numerous articles in the field of obstetrics and gynecology, including, but not limited to, articles on amniocentesis, the "Rh (rhesus)" factor and a chapter in the Encyclopedia of Obstetrics and Gynecology

on these subjects.

2. I share my practice with five other obstetricians/gynecologists. My practice is approximately 50 percent obstetrics, of which approximately three percent or a minimum of three patients per week are pregnancy terminations.

3. Based on my knowledge and experience it is my opinion that:

(a) Section 2(2) defining viability in terms of "more than momentary survival is medically incorrect, confusing and interferes with the exercise of my best medical judgment.

(b) The criminal sanctions of Section 6(4), which establishes an impossible standard of care, prevents me from performing second trimester abortions.

(c) Section 6(3) prohibits the accepted medical practice of testing for genetic complications in aborted fetuses.

fringes on my freedom of speech. Patients misled by this advice who decline to use birth control when so described will have unwanted pregnancies, thus exposing themselves to the medical risks associated with pregnancy termination and childbirth. Unwanted pregnancies have a higher risk of complications and death than do wanted pregnancies.

(e) Section 6(6) which requires me to offer a patient medication for relief of "fetal pain" is medically meaningless, confusing, medically unjustified, and contraindicated. This requirement is cruel and harmful to my patients and establishes a duty which can not be met subjecting me to criminal penalties.

(f) I usually include any persons my patient wants involved in their preliminary consultations, spouses, parents, relatives or friends. But the

requirement of parental and spousal consultation against the wishes of my patients in Sections 3(3) and 3(4) are burdensome, interfere with the privacy of the physician-patient relationship, and cause harmful stress. Many of my patients will avoid this stress by seeking illegal pregnancy terminations, thereby subjecting themselves to much greater medical risks.

(g) Section 3, requiring me to state to my patients and third parties the gestational age of the fetus and also distribute State of Illinois materials which will detail the probable anatomical and physiological characteristics of the fetus, is cruel and punitive toward my patients, causing harmful stress, and can be detrimental to maternal health.

(h) The rigid procedures required for informed consent in Section

3(2) are cruel and punitive to my patients, medically unjustified, unrelated to informed consent, violative of the privacy of the physician-patient relationship, and impairs [sic] my patients' trust in my medical judgment.

(i) SB47 unnecessarily hampers the exercise of my medical judgment, violates my responsibility to my patients, and violates my sense of personal ethics. I would not be able to perform pregnancy terminations in the State of Illinois under this Act.

4. I find the "medical judgment", I am required to make under Section 3.1 of SB47 confusing, failing to provide me any guidance as to what medical criteria or other standards which I am required to adhere to in deciding to perform pregnancy terminations. I perform first trimester abortions and in the past have

performed such abortions at the request of the patients, or abortions which might be considered "elective abortions." Section 3.1 would appear to preclude me from performing such abortions. I also perform second trimester abortions and in the past have performed them because of ascertainbable genetic defects in the fetus. Section 3.1 would seem to preclude me from performing such second trimester abortions.

/S/
ALLAN G. CHARLES, M.D.

[Notarized 10/31/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

LOUIS GERALD KEITH, M.D.

Affiant, LOUIS GERALD KEITH, M.D., being duly sworn on oath deposes and states as follows:

1. I received my M.D. degree from the Chicago Mediaal [sic] School in 1960. I am a registered and licensed physician in Illinois and am actively engaged in the practice of obstetrics and gynecology. I am a professor of obstetrics and gynecology at Northwestern University Medical School, Chicago, Illinois, and a lecturer in obstetrics and gynecology at the Cook County Graduate School of Medicine,

Chicago, Illinois. I am also the Attending Physician, Department of Obstetrics and Gynecology the Prentice Women's Hospital and Maternity Center, Chicago, Illinois. I share a practice with eleven other obstetricians/gynecologists, all of whom are also full-time professors of obstetrics and gynecology at Northwestern University Medical School. I am a Diplomate of the American Board of Obstetrics and Gynecology, and a Fellow of the American College of Obstetricians and Gynecologists, and a Fellow of the American College of Surgeons. I have published or edited numerous articles and books in the field of obstetrics and gynecology, including but not limited to Monitoring Care in Abortion Clinics, 21, J. Reprod. Med. 163 (1978), Abortion and Maternal Health An American Perspective. 63, Int. Surgery 31 (1978), Postpartum and

Postabortal Contraception, (1979), and Safety of Fertility Control, unpublished, publication date early in 1980) editor, and Second Trimester Abortion, (unpublished, publication date early in 1980).

2. Approximately twenty percent of my gynecological practice is devoted to pregnancy terminations or consulting with the National Abortion Federation and the Fields Foundation, private agencies which are involved in the voluntary regulation of abortion clinics.

3. Based upon my knowledge and experience, it is my opinion that:

(a) Section 2(2), defining viability to include a "reasonable likelihood of more than momentary survival" is contrary to medical literature, confusing and hampers the exercise of my best medical judgment.

(b) The statute uses language

that is meaningless from a medical perspective, such as the definition of fetus in Section 2(9) which is contrary to the definition in Dorlan's Medical Dictionary, 25 ed. (1974) and omits any reference to the embryo, which is the standard medical term for the tissue having the potential for human life from conception to eight weeks gestation.

(c) Section 3.1(a) prohibiting any abortion that is not necessary is confusing and would prohibit me from doing elective pregnancy terminations, which are currently a part of my practice.

(d) Section 3.1(b) requiring a written report for the State of Illinois describing the basis for my judgment that the pregnancy termination is necessary subjects me to the possibility of self-incrimination for having done all elective and some therapeutic pregnancy

terminations and, as such, seriously deters me from doing pregnancy terminations.

(e) The provisions for the Act providing alternative requirements for medical emergencies are confusing. Medical emergency, when read in context, acquires a narrow meaning of near death and unconsciousness, contrary to usual medical practice. It interferes with the exercise of my best medical judgment by deterring me from insuring that medical judgments are made in the patients'favor. In order to avoid an unnecessary ethical dilemma, possible self-incrimination and criminal penalties, I will stop performing pregnancy terminations.

(f) Section 3.2 requiring that I personally consult with clinic patients 24 hours before their pregnancy termination if I am to perform the procedure is

medically unnecessary and burdensome. This section will cause up to two days' delay, given the limited hours of surgical facilities, and will cause anxiety which will necessitate increased use of tran quilizers, sedatives, anesthetics, thus retarding recovery and precipitating psychological problems.

(g) The disclosure provisions of Sections 3.2, 3.3 and 3.4 are confusing because long-term sequela [sic] for pregnancy terminations have not been determined and may not exist.

(h) The parental consultation requirement of Section 3.3 is confusing since it contradicts the Illinois Law (1967) which allows confidential medical treatment of teenagers for pregnancies. Pregnancy termination is a recognized form of treatment for pregnancies. Furthermore, this section subjects my

patients to unnecessary stress and some of them will seek unlicensed persons to do criminal abortions, exposing themselves to serious complications and death.

(i) The spousal consultation requirements of Section 3.4 interferes with the privacy of the physician-patient relationship, subjects my patients to unnecessary stress and will encourage my patients to seek pregnancy terminations from unlicensed persons, thereby exposing themselves to increased risks of complications and death.

(j) Section 3.5 requiring me to distribute State propaganda includes material on gestational age that is irrelevant and confusing to nonphysicians and will needlessly cause great anxiety and stress for my patients. This required information will cause some of my patients, to delay their pregnancy termination,

which will increase the risks associated with the procedure and may cause them to delay beyond the point where the procedure can be performed, causing them to have an unwanted child and subjecting them to greater risks of childbirth.

(k) Section 6(3) prohibiting experimentation on aborted fetuses is confusing because of the meaning of experimentation which is not a usual medical term, may include weighing, photographing, and measuring the fetus and using these specifications for clinical review and scientific publication, and is contrary to usual custom in the profession.

(l) Section 6(6) requiring that a physician offer a patient the option of an anesthetic for fetal pain is medically meaningless and contrary to accepted medical practice which dictates that local anesthetics are less hazardous than

general anesthetics. General anesthetics when administered to the patient will circulate in the fetus.

(m) Section 9, banning the saline amniocentesis procedure unless certified as necessary interferes with my exercise of best clinical judgment because it is contrary to medical findings, burdensome in its reporting requirements and intimidating due to the criminal penalties involved.

(n) The reporting requirements of Section 10 are harassing and burdensome, due to the sheer number of reports and the complex nature of the information required, the criminal penalties involved and the release to the general public of the number and type of pregnancy terminations I do.

/S/
LOUIS GERALD KEITH, M.D.

[Notarized 10/30/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

DAVID ZBARAZ, M.D.

Affiant, DAVID ZBARAZ, M.D., being duly sworn on oath, deposes and states as follows:

1. I received my M.D. degree from the University of Illinois College of Medicine in 1965. I am a registered and licensed physician in the State of licensed physician in the State of Illinois and an actively engaged in the practice of obstetrics and gynecology. I am currently on the staff of Michael Reese Hospital, Chicago, Illinois, and a clinical professor of obstetrics and gynecol-

ogy at the University of Chicago. I am a Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetricians and Gynecologists. I am a member of the American Medical Association, the Illinois State Medical Society and the Chicago Medical Society.

2. I share a practice with five other obstetrician/gynecologists. My practice is approximately fifty percent obstetrics, of which approximately three percent or a minimum of three patients per week are pregnancy terminations.

3. Based upon my knowledge and experience, it is my professional opinion that:

(a) the requirement of section 3, which dictates that the physician who performs the procedure must be the physician who consulted with the patient 24

hours earlier is arbitrary and burdensome. This requirement subordinates patient care to the requirements of form, is unrelated to the health needs of the patient and is incompatible with rotating schedules of my clinical group, which is structured to provide timely service to the unpredictable demands of patients giving birth. All the obstetrical patients in my group are accustomed to this rotating schedule of care by the various physicians in my practice. Also, a 24-hour waiting period unjustifiably increases the cost of pregnancy termination, causes unnecessary and harmful stress, and is medically unjustifiable and punitive.

(b) Many, if not most of my patients, are accompanied by spouse, parents, other relatives or friends when I conduct pre-abortion examinations and consultations. But when against the

wishes of my patients, required parental and spousal consultation [§§3.3, 3.4] destroys the privacy and confidentiality of the physician-patient relationship, destroys the patient's trust in her physician, is against the medical interests of some patients, and causes harmful stress. Some patients will avoid mandatory consultation by seeking criminal abortions thereby subjecting themselves to much greater risks of complications and death.

(c) Section 3, requiring me to state to my patients and third parties the gestational age of the fetus and to distribute the State of Illinois literature detailing the probable anatomical and physiological characteristics of the fetus in cruel and punitive toward my patients, causes harmful stress, does not promote maternal health and may be detrimental to maternal health.

The rigid disclosure requirements in section 3(2) are misleading, cruel and punitive to my patients, medically unjustified, unrelated to informed consent, and violative of the privacy of the physician-patient relationship.

(e) Section 6(6) which requires me to offer a patient medication for relief of "fetal pain" is medically meaningless, confusing, medically unjustified, and contraindicated, causing cruel and harmful stress to my patients.

(f) The definition of abortifacient in section 2(10) is medically unjustified, and includes the IUD (intrauterine device--a widely used form of birth control), and menstrual extraction. Furthermore, section 11(e), which is based on section 2(10), requires [me] to describe the above medical methods as abortifacients to my patients, which is cruel,

misleading, unnecessary, and violates the privacy of the physician-patient relationship. Some of my patients will be misled into rejecting appropriate birth control and pregnancy prevention methods, causing unwanted pregnancies.

(g) Section 2(2) defining viability is erroneous and confusing and interferes with the exercise of my medical judgment. This vague definition, used as the basis for the standard of care provision of sections 6(4) and 6(1) exposes me to criminal prosecution without standards and seriously deters me from performing second trimester pregnancy terminations.

(h) Section 6(3) prohibits the accepted medical practice of testing for genetic complications in aborted fetuses to confirm in-utero diagnosis, assist the future family-planning of the patient, and retards further medical knowledge and

is medically unjustifiable.

(i) The reporting scheme of SB47 is so burdensome that it operates as a penalty on me for performing abortions.

(j) SB47 unnecessarily interferes with the exercise of my judgment, violates my responsibility to my patients, violates my sense of personal ethics, and interferes with my right to free speech. I would not be able to perform pregnancy terminations in the State of Illinois under this Act.

4. I find the "medical judgment", I am required to make under Section 3.1 of SB47 confusing, failing to provide me any guidance as to what medical criteria or other standards which I am required to adhere to in deciding to perform pregnancy terminations. I perform first trimester abortions and in the past have performed such abortions at the request of the

patients, or abortions which might be considered "elective abortions." Section 3.1 would appear to preclude me form performing such abortions. I also perform second trimester abortions and in the past have performed them because of ascertainable genetic defects in the fetus. Section 3.1 would seem to preclude me from performing such second trimester abortions.

/S/
DAVID ZBARAZ, M.D.

[Notarized 10/31/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

AFFIDAVIT

HECTOR N. ZEVALLOS, M.D.

Affiant, HECTOR N. ZEVALLOS, M.D., being duly sworn upon his oath, deposes and states as follows:

1. I am a plaintiff in the foregoing encaptioned cause, one of seven representatives of the class of physician-plaintiffs certified by the District Court, and Medical Director of plaintiff-facility, THE HOPE CLINIC FOR WOMEN, LTD.

2. Since the entering by the District Court of its Preliminary Injunction in this cause on November 16, 1979, as amended by orders dated November 19, 1979,

four days have elapsed.

3. The actual experience of myself and plaintiff THE HOPE CLINIC FOR WOMEN, LTD. in attempting to treat medically our women patients, while remaining in compliance with the challenged Act and the District Court's orders, has been near impossible.

4. Many portions of the challenged Act, while seemingly benign upon their face, have seriously prevented and impaired the performance of first trimester abortions in Illinois, in a manner totally inconsistent with the delivery of such services throughout the remainder of the United States.

5. I have read the Affidavits previously filed with the District Court in related cause No. 79C4541 by other physicians; and their predictions as to the consequences of the challenged Act upon

the practice of medicine and their patients, have come to pass.

6. The requirement of Section 3.2 mandating a 24 hour delay and the giving of certain information by the performing physician are directly adverse to the best health interests of my patients. They are contrary to the traditional doctor-patient relationship and they are contrary to present custom of medical practice in the United States.

7. Because abortions are not performed on a daily basis at plaintiff THE HOPE CLINIC FOR WOMEN, LTD. and other outpatient first trimester abortion facilities in Illinois, and because women frequently travel more than 100 miles to reach such a facility; the mandated delay becomes and presently is an insurmountable barrier for many women.

8. The actual number of women able

to receive abortions by me and at THE HOPE CLINIC FOR WOMEN, LTD. has fallen drastically since the District Court's order of November 16, 1979, removing the stay as to certain portions of the challenged Act. Normally 60 patients would have been accomodated during that period. Due to the direct impositions imposed by the challenged Act, that number was reduced to 37, a decrease of 38%.

9. I am personally aware of many women who have been forced by the challenged Act to leave their homes, families, bases of emotional support and the physician of their choice and to travel to other states in order to receive an abortion.

10. The decision to terminate a pregnancy is not lightly made by a woman. Once a woman reaches the stage of seeking medical assistance, she has in the vast

majority of cases already expended considerable energy and time in arriving at her choice. A mandated delay serves no beneficial purpose and, in fact, by reason of the circumstance above described and by reason of the delay itself, her anxiety and stress are significantly increased. It is axiomatic that this increased anxiety and stress adversely impact the risks to her of mortality and morbidity from the abortion. Anxiety and stress similarly adversely impact any surgical procedure.

11. The requirement that the performing physician relate the information prescribed in Section 3.2 locks the physician into a straitjacket in his/her medical practice and prohibits the delegation of information giving to nurses or other adequately trained. Such delegation of information giving is commonplace medical practice, even in surgical procedures

of much greater risk and severity, that [sic] the minor surgical procedure of first trimester abortion.

12. This requirement also prohibits the delegation of the information giving to another licensed physician. Nowhere in medical practice does such an imposition exists. Because of the nature of out-patient abortion facilities throughout the United States, this requirement becomes draconian. Such facilities, including THE HOPE CLINIC FOR WOMEN, LTD., are usually staffed by more than one physician, each working at the facility on a part-time basis, usually one or two days a week. By requiring the same physician who performs the abortion to be the one who at least 24 hours prior thereto to have given the required information, the delays produced are frequently of four or more days duration.

13. I know of no rational reason to believe that a nonphysician could not convey the desired information, as well as the performing physician. In fact, the experience at THE HOPE CLINIC FOR WOMEN, LTD. and my experience is trained nurses perform this function better, due to their counseling skills, experience and the ability to spend greater time with each patient. I believe that another physician could give the information to a patient upon whom I might subsequently perform the abortion, as well as I.

14. The giving by rote of mandated information under Section 3.2 is the very antithesis of the practice of medicine. No exception whatever is provided for the individual patient's needs. No allowance is provided for those cases where I believe in my medical judgment that the giving of such information in [sic]

contraindicated and is not in the best health interests of my patient.

15. Mortality and morbidity from abortion doubles approximately every two weeks. Every delay of three to four days increases the risks to the patient by 25%.

16. The requirement of Section 11(e) of furnishing the name and identity of abortion patients to the State of Illinois, whenever post-procedure ca is given, is a direct breach of the confidentiality of the doctor-patient relationship. I consider it my duty to inform each patient of my statutory obligation to furnish her name to the State, merely because I have treated her for an abortion she may have received from someone else.

17. I have no doubts that such breach of confidentiality will dissuade countless patients from seeking and

receiving the post-surgical care they may desparately need. I would be remiss to treat such a patient without first informing her of my legal duty to report her identity to the State.

18. I believe there is no reasonable manner to comply with the challenged Act and the District Court's present orders, so as to accomodate the existing medical needs in the medical community I serve, in a manner consistent with a high level of medical competence and expertise, and in a manner affordable and accessible to my present patient population.

19. The impact of the challenged Act as above described upon the general abortion patient population as a whole, has additional and disproportionate impact upon the economically disadvantaged, the young, the rural and the minority woman, by reason of her greater lack of

sophistication and resources to deal with the problem pregnancy.

/S/
HECTOR N. ZEVALLOS, M.D.

[Notarized 11/20/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

JOSEPH T. GALLAGHER, M.D.

Affiant, Joseph T. Gallagher, M.D., being duly sworn on oath, deposes and states as follows:

1. I received my M.D. degree from the Stritch School of Medicine, Loyola University in 1953. I am a registered and licensed physician in the state of Illinois and am actively engaged in the practice of obstetrics and gynecology. I am currently on the staff of Little Company of Mary Hospital, Evergreen Park, Illinois, where I am a Senior Attending Staff Member and Consultant in Obstetrics

and Gynecology. I am a Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetrics and Gynecologists. I am a member of the American Medical Association, the Illinois State Medical Society, and the Chicago Medical Society.

2. I am actively engaged in the practice of Obstetrics and Gynecology. My practice is approximately seventy-five percent obstetrics, and I am currently treating approximately 140 pregnant women and their unborn children.

3. Based upon my knowledge and experience it is my professional opinion that:

(a) The requirements of Section 2(2) which defines viability as "a reasonable likelihood of more than momentary survival with or without artificial life support" is consonant

with standard definitions of viability in the medical literature and would be a clear and concise guideline for practitioners of obstetrics.

(b) Section 2(1), which defines the first trimester as "the first twelve weeks of gestation commencing with ovulation", is a definition supportable from medical literature and common usage and would be a definition acceptable to practitioners of obstetrics.

(c) Section 3.1(A), which permits [sic-prohibits] any unnecessary abortion, is not confusing. It reflects a proper distinction between necessary and unnecessary treatment. No treatment should be rendered if it is not deemed necessary.

(d) Section 3.1(B), which requires that the patient actually meet and be counseled by the physician who is to

perform the abortion in advance, is perfectly reasonable in non-emergency situations and in accord with standard medical practice.

(e) Section 3.2, which requires certain circumstances surrounding the patient's giving of informed consent, is not unreasonable and, in fact, differs very little from the basic philosophy of insuring informed consent to any medical or surgical procedure.

(f) Regarding the use of "medical emergency" in various sections of the Law, practioners [sic] of medicine must make daily judgements as to whether or not surgery is "emergency" and as to whether or not patient admissions to the hospital are "emergency admissions". Therefore, the use of the term "medical emergency" would not be confusing or

ambiguous for the practicing obstetrician.

/S/
JOSEPH T. GALLAGHER, M.D.

[Notarized 11/7/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

THOMAS G. GORMAN, M.D.

Affiant, Thomas G. Gorman, M.D., being duly sworn on oath, deposes and states as follows:

1. I received my M.D. degree from the Catholic University of Louvain, Belgium in 1955. I am a registered and licensed physician in the State of Illinois and am actively engaged in the practice of obstetrics and gynecology. I am currently on the Staff of Little Company of Mary Hospital, Evergreen Park, Illinois. I am a Diplomate of the American Board of Obstetrics and Gynecology and a

Fellow of the American College of Obstetrics and Gynecologists [sic]. I am a member of the American Medical Association, the Illinois State Medical Association, and the Chicago Medical Society.

2. I am actively engaged in the private practice of Obstetrics and Gynecology. My practice is approximately seventy-five percent obstetrics, and I am currently treating approximately 85 pregnant women and their unborn children.

3. Based upon my knowledge and experience, it is my professional opinion that:

(a) the requirements of Section 2(2) which defines viability as "a reasonable likelihood of more than momentary survival with or without artificial life support" is consonant with standard definitions of viability in the medical literature and would be a clear and concise

guideline for practitioners of obstetrics.

(b) Section 2(1), which defines the first trimester as "the first twelve weeks of gestation commencing with ovulation", is a definition supportable from medical literature and common usage and would be a definition acceptable to practitioners of obstetrics.

(c) Section 3.1(A), which permits [sic-prohibits] any unnecessary abortion, is not confusing. It reflects a proper distinction between necessary and unnecessary treatment. No treatment should be rendered if it is not deemed necessary.

(d) Section 3.1(B), which requires that the patient actually meet and be counseled by the physician who is to perform the abortion in advance, is perfectly reasonable in non-emergency situations and in accord with standard medical

practice.

(e) Section 3.2, which requires certain circumstances surrounding the patient's giving of informed consent, is not unreasonable and, in fact, differs very little from the basic philosophy of insuring informed consent to any medical or surgical procedure.

(f) Regarding the use of "medical emergency" in varous sections of the Law, practioners of medicine must make daily judgements as to whether or not surgery is "emergency" and as to whether or not patient admissions to the hospital are "emergency admissions". Therefore, the use of the term "medical emergency" would not be confusing or ambiguous for the practicing obstetrician.

/S/
THOMAS G. GORMAN, M.D.

[Notarized 11/7/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

MARTIN MOTEW, M.D.

Affiant, MARTIN MOTEW, M.D., being duly sworn on oath, deposes and states as follows:

1. I received my M.D. degree from the Chicago Medical School in 1967. I am a registered and licensed physician in the State of Illinois and am actively engaged in the practice of obstetrics and gynecology. I am currently a clinical professor of obstetrics and gynecology at the University of Chicago. I am a Diplomate of the American Board of Obstetrics and Gyncecolgy, and a Fellow

of the American College of Obstetricians and Gynecologists. I am a member of the American Medical Association, the Illinois State Medical Society, and the Chicago Medical Society.

2. I share a practice with five other obstetrician/gynecologists. My practice is approximately fifty percent obstetrics, of which approximately three percent or a minimum of three patients per week are pregnancy terminations.

3. In connection with my obstetrical and gynecological practice I conduct amniocentesis on pregnant patients for purposes of determining whether the embryo or fetus has any genetic defects. Examples of the genetic defects which can be determined through amniocentesis are Tay-Sachs, and Down's Syndrome (mongoloidism). If the results of the amniocentesis disclose such a genetic defect and

the woman wishes an abortion, I perform a second trimester abortion upon her, using either prostaglandin induction or saline induction procedure.

4. Based upon my knowledge and experience, it is my professional opinion that:

(a) the requirement of Section 3, which dictates that the physician who performs the procedure must be the physician who consulted with the patient 24 hours earier is arbitrary and burdensome. This requirement subordinates patient care to the requirement of form, is unrelated to the health needs of the patient and is incompatible with rotating schedule of my clinical group, which is structured to provide timely service to the unpredictable demands of patients

giving birth. All the obstetrical patients in my group are accustomed to this rotating schedule of care by the various physicians in my practice. Also, a 24-hour waiting period unjustifiably increases the cost of pregnancy termination, causes unnecessary and harmful stress, and is medically unjustifiable and punitive.

(b) Many, if not most of my patients, are accompanied by spouse parents, other relatives or friends when I conduct pre-abortion examinations and consultations. But when against the wishes of my patients, required parental and spousal consultation [§§3.3, 3.4] destroys the privacy and confidentiality of the physician-patient relationship, destroys the patient's trust in her

physician, is against the medical interests of some patients, and causes harmful stress. Some patients will avoid mandatory consultation by seeking criminal abortions thereby subjecting themselves to much greater risks of complications and death.

(c) Section 3.5 requiring me to state to my patients and third parties the gestational age of the fetus and to distribute the State of Illinois literature detailing the probable anatomical and physiological characteristics of the fetus is cruel and punitive toward my patients, causes harmful stress, does not promote maternal health and may be detrimental to maternal health.

(d) The rigid disclosure requirements in Section 3.2 are misleading, cruel

and punitive to my patients, medically unjustified, unrelated to informed consent, and violative of the privacy of the physician-patient relationship.

(e) Section 6(6) which requires me to offer a patient medication for relief of "fetal pain" is medically meaningless, confusing, medically unjustified, and contraindicated, causing cruel and harmful stress to my patients.

(f) The definition of abortifacient in Section 2(10) is medically unjustified, and includes the IUD (Intrauterine Device) -- a widely used form of birth control), and menstrual extraction. Furthermore, Section 11(d), which is based on Section 2(10), requires me to describe the above medical methods

as abortifacients to my patients, which is cruel, misleading, unnecessary, and violates the privacy of the physician-patient relationship. Some of my patients will be mislead into rejecting appropriate birth control and pregnancy prevention methods, causing unwanted pregnancies.

(g) Section 2(2) defining viability is erroneous and confusing and interferes with the exercise of my medical judgment. This vague definition, used as the basis for the standard of care provision of Sections 6(4) and 6(1) exposes me to criminal prosecution without standards and seriously deters me from performing second trimester pregnancy terminations.

(h) Section 6(3) prohibits the accepted

medical practice of testing for genetic complications in aborted fetuses to confirm in-utero diagnosis, assist the future family-planning of the patient, and retards further medical knowledge and is medically unjustifiable.

(i) The reporting scheme of SB47 is so burdensome that it operates as a penalty on me for performing abortions.

(j) SB47 unnecessarily interferes with the exercise of my judgment, violates my responsibility to my patients, violats my sense of personal ethics, and interferes with my right to free speech. I would not be able to perform pregnancy terminations in the State of Illinois under this Act.

4. I find the "medical judgment", I

am required to make under Section 3.1 of SB47 confusing, failing to provide me any guidance as to what medical criteria or other standards which I am required to adhere to in deciding to perform pregnancy terminations. I perform first trimester abortions and in the past have performed such abortions at the request of the patients, or abortions which might be considered "elective abortion." Section 3.1 would appear to preclude me from performing such abortions. I also perform second trimester abortions and in the past have performed them because of ascertainable genetic defects in the fetus. Section 3.1 would seem to preclude me from performing second trimester abortions.

5. A pregnancy test is not always required in order to make a diagnosis of pregnancy. After approximately ___ weeks

of pregnancy, pregnancy can be confirmed by an internal pelvic examination.

6. The standards of care toward the fetus required by Sections 6(1) and 6(4) are confusing, use medically meaningless terminology and do not present me with a clear understanding of what conduct on my part would be considered criminal.

7. The provision of Section 6(2) subjects me to possible prosecution for murder if I fail to take measures to save a nonviable fetus. This is true because the section equates live birth with a viable birth. Medically, live birth is not the equivalent to viability, and can include such minimal life signs as a pulsating umbilical cord.

8. Section 11(e), requires me to report the name and diagnosis of any patient suffering complications to the Department of Public Health. This

provision is an unjustified violation of the confidentiality of the physician-patient relationship. Also, because the word "complication" is undefined, the only way that I can protect myself from possible prosecution is to report a limitless number of conditions the woman may be suffering, even I'm not sure the condition results from the abortion procedure. In essence, I would have to submit all post-operative histories to the Department of Public Health.

9. Section 6(3) prohibits autopsies or confirmation of genetic defects diagnosed by amniocentesis or feteoscopy. These tests are conducted under my supervision and direction on fetal tissue after abortions which have been performed as a result of the diagnosis of defect. This type of testing is necessary in order that I may consult and advise my

patients with respect to their future family-planning.

10. I have done research in perinatal medicine, including published papers on premature labor, fetal monitoring, and ultrasonography. This research has involved my use from time to time of sampling of fetal material in utero. Section 6(3) would preclude me from conducting this kind of research.

Further affiant sayeth not.

/S/
MARTIN MOTEW, M.D.

[Notarized 11/8/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

AFFIDAVIT OF DIANA SHARK

I, Dianna Shark, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am 33 years old and believe in family planning.

2. I also believe that there is a big difference between drugs or devices which act to prevent conception/fertilization and those which terminate a pregnancy after that point in time. I say this because I believe that a human being exists from the point of conception forward. I believe that any drug or device which prevents childbirth after the point

of conception acts as an abortifacient and ends the life of a human being.

3. I, therefore, would not want to use an abortifacient. Information concerning the abortifacient character of any prescription should be required so that I can exercise my right to choose between abortifacients and other methods of family planning.

Respectfully submitted,

/S/
Dianna Shark

[Notarized 6/13/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

AFFIDAVIT OF MARY CHRISTINE GASPAR

I, Mary Christine Gaspar, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am of childbearing age.

2. I am of the opinion that an individual human being exists from conception until death. I also believe that it is morally wrong to end the life of an innocent human being no matter how young it is.

3. I do not, however, think that family planning through the use of contraceptives is inappropriate since it does not terminate the life of a human being.

It merely prevents that life from beginning.

4. Because of my beliefs and my desire to plan my family in a manner which would not conflict with those beliefs, I feel that it is necessary to know the effect of drugs or instruments which are commonly used for family planning. This would enable me to choose between those which act only as contraceptives and those which act as abortifacients.

5. Therefore, I think that it is imperative that anyone prescribing an abortifacient inform me of its abortifacient nature.

Respectfully submitted,

/S/
Mary Christine Gaspar

[Notarized 6/13/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

AFFIDAVIT OF DEBRA ELROD EVANS

I, Debra Elrod Evans, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am 29 years old.

2. I am not opposed to taking contraceptives as a means of family planning.

3. Because I believe that life begins at conception and that it is morally wrong to end a life, I would not knowingly use any instrument or drug which is known to cause the death of a fertilized egg--either through direct action on that egg or through prevention of its implantation.

4. I would expect any person prescribing an instrument or drug which acts to cause the death of a fertilized egg to inform me of its abortifacient nature. Without such information, I would not be able to exercise my choice of family planning according to my beliefs as set forth above.

Respectfully submitted,

/S/
Debra Elrod Evans

[Notarized 6/13/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

JASPER F. WILLIAMS, M.D

Jasper F. Williams, M.D. being duly sworn, deposes and states as follows:

1. I am a board-certified Obstetrician-Gynecologist. I practice in the State of Illinois. A copy of my curriculum vitae is appended to this affidavit.

2. I have read and am familiar with Ill. Rev. Stat. 38, secs. 81-21 to 81-35 (1979), the Illinois Abortion Law of 1975, as amended. The statements in this affidavit are based on my medical experience and knowledge and best medical judgment.

3. I have read and understood

section 2(2) (definition of viability). This section is fully intelligible to a physician in the usual course of his practice. Its use of the phrase "more than momentary" to designate the length of time that the fetus must survive in order to be classified as "viable" is comprehensible and logical. Indeed, it is clearer than the term "sustained" survival. It is easier to judge whether or not a fetus would be born, take a few labored breaths and then expire--that is, live only "for a moment"--than it would be to judge whether or not a fetus could survive for a "sustained" period of time. "Sustained survival" is an open-ended term that could conceivably mean that the fetus is simply capable of surviving beyond the first critical moments of extra-uterine life, or could conceivably mean that it must be certain that the fetus can survive

to adulthood if born. The later meaning of "sustained survival" would be medically incongrous [sic] since, at the margins of viability, it is not possible to conclude that a fetus can be "sustained" to adulthood. Hence, it would logically follow that "sustained" survival means survival beyond the first critical moments of existence--"more than momentary survival" --which is precisely what section 2(2) states directly and clearly. It must, therefore, be concluded that "more than momentary" survival and "sustained" survival mean the same thing, but that the former term states the issue more clearly and directly than the later [sic] because a laborious analytic process is not necessary to discern its meaning.

4. I have read and undestood [sic] sections 2(2), 2(6), 2(8) and 2(10) (definitions of abortion, fetus, human

being, unborn child, and abortifacient). At all stages, from fertilization until death, an individual organism of the species homo sapiens is "human." Such an organism is "in being" so long as it lives. It is, therefore, logically, scientifically, and medically accurate to denominate such an organism a "human being," and the med ical literature supports this reasoning and conclusion. See G. D. Dodds, The Essentials of Human Embryology 2 (2nd ed. 1964); M. S. Gilbert, Biography of the Unborn 2, 5 (1938); J. C. Heisler, A Textbook of Embryology for Students of Medicine 38 (2nd ed. 1901); I. N. Quimby, Introduction to Medical Jurisprudence: Address Delivered by the Chairman of the Section of Medical Jurisprudence at the 38th Annual Meeting of the AMA, June 10, 1887, 9 JAMA 161-166 (1887); J. M. McMurrich,

The Development of the Human Body: A Manual of Human Embryology 31 (7th ed.); W. J. Hamilton, et al, Human Embryology (Prenatal Development of Form and Function) 1 (1945); L. B. Arey, Developmental Anatomy ch. 2 & 6 (6th ed. 1954); A. Ingleman-Sundberg and C. Wirsen, A Child is Born: The Drama of Life Before Birth (1965); B. M. Patten, Human Embryology ch. 7 (3d ed. 1968); R. Rugh and L. B. Shettles, From Conception to Birth: The Drama of Life's Beginnings (1971); B. M. Patten, Human Embryology 41-42 (3d ed. 1968); C. B. Arey, Developmental Anatomy: A Textbook and Laboratory Manual of Embryology 55 (1965); J. Langmann, Medical Embryology 3 (2nd ed. 1969); H. Gordon, Genetical, Social and Medical Aspects of Abortion, 1968 South African Med. J. 721-30; L. B. Shettles, Ovum Humanum 60 (1960); J. Davies, Human

Developmental Anatomy 3 (1963).

5. I have read and understood section 3.1 (physician consultation). It is standard medical practice for the physician individually to consult with a patient prior to performing surgery upon him or her, except in a medical emergency.

6. I have read and understood sections 6(2) (infanticide provision), 6(3) (fetal experimentation), and 12 (pathology reporting), which employ the terms "aborted alive," "live birth," and "dead fetus." Obviously, a child is "live born" regardless of whether he or she has been born alive during the course of an abortion or through natural processes. The manner of birth cannot alter the fact that a child has been born alive. Therefore, "live birth" and "aborted alive" are equivalent when applied to describe the physical status of a child. I cannot

imagine how a physician with any professional integrity whatever could assert that either "aborted alive" or "live birth" is ambiguous. These terms both obviously and self-evidently describe a child who is alive. Moreover, they obviously and self-evidently describe a child born with <u>any</u> life signs, whether "minimal" or not. I cannot understand where any controversy can logically exist in this regard: a child cannot be "dead" if he or she has life signs, whether minimal or not. How can a child be "dead" when he or she is, by definition, alive? "Live birth" is not ambiguous. The physician, in the ordinary course of his professional practice, must obviously know when a child is born alive and is required to make fetal death reports pursuant to Ill. Rev. Stat. Ch. 111½, sec. 73-1(b) 1979:

> "Live birth" means the complete explusion or extraction from its mother of a product of human conception irrespective of the duration of pregnancy, which after such separation breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.

This standard could hardly be clearer--it describes a child born alive (whether by abortion or through normal processes) and obviously excludes any consideration of whether or not the life signs it delineates are "minimal."

7. I have read and understood section 9 (saline abortion restriction). It is apparent that the use of prostaglandin as a method of abortion poses a greater risk of morbidity--a greater risk to maternal <u>health</u>--than the use of saline.

Grimes & Cates, Jr., The Comparative Efficacy and Safety of Intraamniotic Prostaglandin F2alpha and Hypertonic Saline for Second Trimester Abortion, 22 J. Reprod. Med. 248, 253 (attached hereto). It is to be noted, however, that the supposed "health risks" of prostaglandin involve relatively minor matters: nausea, vomiting, diarrhea, fever, and "live birth." Id. at 252-253. (It is impossible to see how the "live birth" can legitimately be called a maternal "health risk" from prostaglandin.) But it is clear that the use of hypertonic saline as a method of abortion poses a greater risk to maternal life than does prostaglandin. Id. at 252. See also abortion-related maternal morbidity/mortality data released by the United States Center for Disease Control (attached hereto).

8. I have read and understood section 6(3) (fetal experimentation), which states that there shall "be no exploitation of or experimentation with" an aborted fetus or tissue. This provision would obviously not preclude testing of the fetus or tissue. "Experimentation" denotes the use of the fetus or tissue to develop a new body of scientific knowledge. "Exploitation" denotes use of the fetus for some commercial or scientifically irrelevant purpose. "Testing" does not fall within either of these categories as the term is employed by the medical profession.

Respectfully submitted,

/S/
JASPER F. WILLIAMS, M.D.

[Notarized 7/8/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

ADOPTION OF MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF OF INTERVENING DEFENDANTS.

Comes now Defendant RICHARD M. DALEY, State's Attorney of Cook County, Illinois, by ROBERT J. TONOS, Assistant State's Attorney, and states as follows:

Whereas the duties imposed upon Defendant DALEY by Ill. Rev. Stat. 1981, ch. 14, par. 5, place him as the State's Attorney of Cook County, Illinois, in pari causa with the intervening Defendants with respect to the disposition of the legal issues remaining in the instant lawsuit.

Therefore, Defendant DALEY, pursuant to Rule 10(c) of the Rules of Civil Procedure, adopts as his own the Intervening

Defendants' contemporaneously filed Supplemental Brief in Support of Intervening Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

RICHARD M. DALEY
State's Attorney of Cook County

By: /S/
Robert J. Tonos
Assistant State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
443-4553

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

ADOPTION OF SUPPLEMENTAL BRIEF
OF INTERVENING DEFENDANTS

NOW COME defendants NEIL F. HARTIGAN, Attorney General of Illinois and William L. Kempiners, Director, Department of Public Health, State of Illinois, and pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, adopt the Intervening-Defendants Supplemental Brief in Support of their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

/S/

KATHLEEN KREISEL
Assistant Attorney General
(of Counsel)
160 N. LaSalle, Room 850
Chicago, IL 60601
312/793-3700

NEIL F. HARTIGAN
Attorney General of Illinois

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALLAN G. CHARLES, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4541
BERNARD CAREY, et al.,	)	
Defendants.	)	
THE HOPE CLINIC FOR WOMEN, LTD., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4548
TYRONE C. FAHNER, et al.,	)	
Defendants.	)	

October 14, 1983
As amended November 2, 1983

MEMORANDUM OPINION

KOCORAS, District Judge:

This matter comes before the Court on the parties' cross motions for summary judgment. Plaintiffs seek entry of a permanent injunction against the

enforcement of the Illinois Abortion Law of 1975, as amended,[1] on the grounds that the legislation is unconstitutional. Numerous sections of the legislation have already been preliminarily enjoined as a result of orders issued by Judge Flaum (Memorandum Opinion, November 16, 1979), the Seventh Circuit Court of Appeals (Charles v. Carey, 627 F.2d 772 (7th Cir. 1980), and by this Court Charles v. Carey, 579 F.Supp. 377 (N.D.Ill.1983). In this opinion, the constitutionality of each section shall be discussed sequentially.[2]

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1. The legislation, commonly known as "S.B. 47," is codified at Ill.Ann. Stat. ch. 38 §§81-11 to 81-34. (Smith-Hurd Supp.1982).

2. The applicable Constitutional standards upon which my decision must be based were discussed in my earlier opinion. 579 F.Supp. at 378-379. As a general matter, because this legislation has already been subject to extensive judicial scrutiny, I shall not attempt to summarize the bases for previous holdings. Rather, the earlier opinions will be referenced.

Section 1 of the legislation is the Preamble. Despite the clear holding of the Supreme Court in Roe v. Wade,[3] and reaffirmed in City of Akron v. Akron Center for Reproductive Health,[4] that "a State may not adopt one theory of when life begins to justify its regulation of abortions,"[5] the Preamble in the instant statute arguably attempts to do just that. It declares the General Assembly's view "that the unborn child is a human being from the time of conception and is . . . entitled to the right of life from conception." However, because the Preamble also contains language which states that the legislature intended "to reasonably

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3. 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

4. ____ U.S. ____, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983).

5. Akron, ___ U.S. at ___, 103 S.Ct. at 2500. See also Roe v. Wade, 410 U.S. at 159-162, 93 S.Ct. at 729-731.

regulate abortion in conformance with the decisions of the United States Supreme Court [in Roe v. Wade and its companion cases]" (emphasis supplied), the Seventh Circuit has held that the Preamble does not express an unlawful purpose, when read as a whole. Charles v. Carey, 627 F.2d at 779. Most important, because the Preamble is largely rhetorical and effectively has little impact on the substantive provisions of this Act,[6] it does not unconstitutionally burden a woman's protected interest in obtaining an abortion. Accordingly, Section 1 shall not be permanently enjoined.

In contrast, I find that certain portions of Section 2, the definitional section, do have an impact upon the

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6. See Wynn v. Scott, 449 F.Supp. 1302, 1314-1315 n.9 (N.D.Ill.1978), aff'd sub nom. Wynn v. Carey, 599 F.2d 193 (7th Cir.1979).

substantive provisions of the legislation and therefore do burden a woman's choice regarding an abortion. Thus, for the reasons set forth in the earlier opinions by the Seventh Circuit[7] and this Court,[8] a permanent injunction shall issue against Sections 2(8), 2(9), and 2(10).

[1] Section 2(2) defining viability was recently amended to replace the clause "more than momentary" with the word "sustained".[9] This change removes the objections found by Judge Flaum earlier, and

7. 627 F.2d at 789. See also discussion infra.

8. 579 F.Supp. at 379-380.

9. Illinois Senate Bill 666 became law on September 17, 1983. It amends Section 2(2) of the present Act such that "'viability" means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support." Thus, the word "sustained" replaces the clause "more than momentary."

renders the definition constitutional under Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed2d 788 (1976). The preliminary injunction entered as to Section 2(2) is therefore dissolved and no permanent injunction shall issue. The remaining portions of Section 2 are not being challenged by plaintiffs at this time,[10] so they shall also stand.

Section 3.1(A) requires the doctor who is to perform an abortion to determine, for himself, that in his best clinical judgment the abortion is necessary. For the reasons set forth by this Court[11]

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10. See Plaintiffs' "Supplemental Memorandum In Support of Plaintiffs' Motion for Supplemental Judgment," July 29, 1983, Exh. A. In previous opinions, Section 2(6) defining "abortion" has been upheld. 627 F.2d at 788; 579 F.Supp. at 380.

11. 579 F.Supp. at 382-383.

and the Court of Appeals[12] in the earlier opinions, this subsection is constitutional and shall not be enjoined.

Section 3.1(B)(1)(a) sets forth certain requirements concerning a mandatory "consultation" between the woman and the doctor who is to perform her abortion. Defendants concede that it is an unconstitutional provision after Akron. A permanent injunction shall enter against it, for the reasons set forth in this Court's earlier opinion.[13]

[2] Section 3.1(B)(1)(b) requires the doctor performing the abortion to describe, on a form provided by the State, the "basis" of his best clinical judgment that the abortion is necessary. Although this Court sees no constitutional difficulty in requiring a physician to

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12. 627 F.2d at 786-87.

13. 579 F.Supp. at 383.

"certify" that the abortion was medically necessary,[14] to insist that a doctor "describe" the "basis" for that clinical judgment may unnecessarily interfere with both the confidentiality of the woman's abortion decision and the physician-patient consultation. The Akron Court made clear that neither of these two areas may be interfered with by the State during the first trimester, even by "minor regulations on the abortion procedure."[15] Further, it is unclear what need the State has for more detailed information than a certification. Accordingly, a permanent injunction shall issue as to

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14. This was the rationale relied upon by this Court in initially upholding Section 3.1(B)(1)(b).

15. ___ U.S. at ___, 103 S.Ct. at 2493.

as to Section 3.1(B)(1)(b).[16]

Section 3.2 was written to ensure that a woman gives voluntary and informed consent before an abortion is performed. Numerous subparts of this section have been preliminarily enjoined, and a permanent injunction shall issue against them for the reasons set forth in the earlier opinions.[17]

The only portion of Section 3.2 about which there continues to be a dispute is the first sentence of Section 3.2(A) which provides, simply: "No abortion shall be

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16. Because Section 3.1(B)(1)(a) and (B)(1)(b) have been enjoined, (B)(2) and (B)(3) are rendered meaningless. The permanent injunction shall therefore issue against Section 3.1(B) in its entirety.

17. 627 F.2d at 779-86; 579 F.Supp. at 381. Defendants now concede that all of Section 3.2 is unconstitutional, with the exception of the first sentence of Section 3.2(A), discussed infra. Sections 3.2(B) and (C) shall therefore also be enjoined.

performed except with the voluntary and informed consent of the woman upon whom the abortion is to be performed." Plaintiffs' primary argument is not directed towards the substance of this sentence, but rather, to any piecemeal treatment of the section.

[3] Form must not be elevated over substance by any court, especially when constitutional issues are raised. However, a case such as this also involves a statute, drafted with parts and subparts, and containing a severability clause. In such a situation, when constitutional infirmities are discovered, the court must struggle to effectuate the constitutional purpose of the legislature, to decide which clauses, subparts and sections must be enjoined, and to determine which of the remaining provisions may still be enforced.

The Supreme Court's decision in Akron teaches that effectuation of the legislature's constitutional purpose may be accomplished in several ways. First, the court may strike an entire undivided provision, on the grounds that severing only certain words or phrases would leave a remnant which the court could not be sure would have been enacted alone.[18] Alternatively, when a section has been carefully divided by the legislators into subsections, the court may find itself able to strike the unconstitutional subparts while leaving others, pursuant to

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18. See ____ U.S. at ____, 103 S.Ct. at 2504 n. 45.

a severability clause.[19] Finally, when an introductory clause is followed by subparts, each of which are individually affected by the introduction, and the former is found to be unconstitutional, then each of the underlying subparts must also be enjoined because they are necessarily infected by the introduction's infirmities. This is true even if the subparts, standing alone, would be sound.[20]

[4] In its earlier opinion, this Court followed the third approach outlined

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19. The informed consent section at issue in Akron had several subparts. Part (A) simply stated that informed consent was required, as §3.2(A) does in the instant case. Part (B) of the Akron statute specified those things which a physician was required to tell a patient to ensure that her consent was "informed" and therefore is substantially comparable to §3.2(A)(1) of the Illinois law. Although Part (A) was not stricken by the Court, Part (B) was. See ____ U.S. at ___, 103 S.Ct. at 2489 n. 5.

20. See ____ U.S. at ___, 103 S.Ct. at 2501 n. 37.

above to enjoin subsections 3.2(A)(1)(a)(i)-(iv). The overarching language in Section 3.2(A)(1)(a) was unconstitutional, so a preliminary injunction was issued against the subparts which followed it. In contrast, the disputed phrase in Section 3.2(A) does not follow any unconstitutional language; it is the first sentence of the section. It also sets forth a constitutional, and unquestionably wise requirement that informed consent be obtained.[21] Although the legislature clearly wanted "informed consent" to be defined as it had set forth in (a)(i)-(iv), I cannot believe that it would have retreated entirely from its desire to demand such consent once faced with this Court's ruling as to that definition. Accordingly, I find that the first sentence of

21. See 579 F.Supp. 380-381, citing the Seventh Circuit's opinion in this case and Akron.

Section 3.2(A) should not be enjoined.

Section 3.3 is the mandatory parental notice section. Judge Flaum enjoined the entire section and defendants now concede its unconstitutionality. A permanent injunction must issue against it.

Section 3.4 requires spousal notification. I agree with Judge Flaum that the section is overinclusive and therefore unconstitutional.[22] It must be permanently

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22. Memorandum Opinion, November 16, 1979, pp. 19-21.

enjoined.[23]

Sections 3.5 and 4, regarding information to be distributed to the woman, and the required use of hospitals for abortions after the first trimester, are

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23. The affidavits submitted by defendants do not alter my conclusion. Although this evidence is apparently submitted in an effort to establish that an abortion can create a greater than de minimus risk of harm to a woman's future procreative potential, this conclusion was specifically rejected by the District Court after extensive testimony in Scheinberg v. Smith, 550 F.Supp. 1112 (S.D.Fla. 1982). Moreover, even if defendants' factual assertions were accepted, their argument still fails to explain why either an estranged husband or one who has deserted his wife retains any constitutionally protected interest in being informed of the woman's intention to have an abortion. In Scheinberg v. Smith, 659 F.2d 476 (5th Cir.1981), the only case cited by defendants, the Court specifically relied upon the fact that the statute there did not require spousal notice if the couple was estranged. 659 F.2d at 486 ("given non-estrangement of the couple, as section 390.00(4)(6) posits..."). Thus, as Judge Flaum concluded, the section is unconstitutionally overbroad.

both conceded by defendants to be unconstitutional.[24] Both shall be permanently enjoined.

Section 5 concerns post-viability abortions. Judge Flaum issued a preliminary injunction against the entire section based upon his finding that the definition of "viability" was unconstitutional. The recent amendment to the definition removes that earlier objection and renders Section 5(2) clearly constitutional.[25] The preliminary injunction against this subpart is therefore dissolved. Section 5(3) is rendered

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24. See 579 F.Supp. at 382 (§3.5(1)); 627 F.2d at 784 (§3.5(2)); Akron, ___ U.S. at ___, 103 S.Ct. at 2493-2497 (hospitalization requirement). Section 4 is thus unconstitutional despite the amended definition of viability.

25. Plaintiffs concede this. See their "Memorandum in Support of Motion for Preliminary Injunction," November 9, 1979, p. 23.

meaningless because it references another provision which will be enjoined. See discussion of Section 10, infra.

Plaintiffs still insist, however, that Section 5(1) remains unconstitutional. They contend that this section, when read in conjunction with the definition of "viability" found in Section 2(2), creates an unconstitutional ambiguity of the type stricken in Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979).[26] In that case the Supreme

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26. In Colautti the statute provided, in pertinent part:

> Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill. . . . Id. at 380 n. 1, 99 S.Ct. at 678 n. 1.

Court found it unclear whether the statute in question "import[ed] a purely subjective standard, or whether it impose[d] a mixed subjective and objective standard." 439 U.S. at 391, 99 S.Ct. at 683.[27] Such an ambiguity was constitutionally impermissible, said the Court, especially in light of the criminal sanctions imposed for a violation of the section.

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27. As the Court explained:

> Apparently, the determination of whether the fetus "is viable" is to be based on the attending physician's "experience, judgment or professional competence," a subjective point of reference. But it is unclear whether the same phrase applies to the second triggering condition, that is, to "sufficient reason to believe that the fetus may be viable." In other words, it is ambiguous whether there must be "sufficient reason" from the perspective of the judgment, skill, and training of the attending physician, or "sufficient reason" from the perspective of a cross section of the medical community or a panel of experts.
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> Id. at 391, 99 S.Ct. at 683-684.

[5] Section 5(1) of the instant statute provides that "No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable on a form prescribed by the [Health] Department..." (emphasis supplied). Viability, in turn, is now defined under Section 2(2) as "that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support." Plaintiffs believe that because Section 2(2) "already purportedly has the equivalent of the 'reasonable medical certainty'" language in Section 5(1), the latter can only be read

> as requiring, in essence that, prior to performing a non-therapeutic abortion, the physician must certify that with reasonable medical certainty (objective) there is in turn a reasonable likelihood that the fetus is not capable of [sustained][28] survival (arguendo, subjective).

"Plaintiffs' Joint Reply Memorandum in Support of Motion for Preliminary Injunction," November 9, 1979, p. 23.

I disagree with plaintiffs' reading of Section 2(2). I do not believe that it establishes an "arguendo subjective" standard. The fact that a physician must determine whether a fetus is viable on a case by case basis, rather than by simply referring to an automatic gestational time limit such as 28 weeks, does not render the standard which he is to apply

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28. The change in the quotation reflects the recent amendment to the law redefining viability. See note 9, supra. It does not alter plaintiffs' argument.

"subjective." Instead, it is a recognition of the medical fact that the point of viability varies with each pregancy and is a medical question. See Danforth, 428 U.S. at 64-65, 96 S.Ct. at 2838-2839. Likewise, the fact that a physician is to rely upon his "medical" judgment does not imply that he eschews the standards of objective reasonableness established by the medical community, and looks solely to his own past experience. To the contrary, it implies exactly the opposite. This is especially true when the clause is viewed in context: "in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival..." (emphasis supplied). An objective reasonableness standard is patently intended to control. Because I do not read Section 2(2) as

establishing a standard which conflicts with the "reasonable medical certainty" language of Section 5(1), the latter is not unconstitutionally ambiguous and shall not be enjoined.[29]

Section 6 contains various provisions regarding a physician's standard of care for the fetus and experimentation with the fetus. Section 6(2) has already been preliminarily enjoined by the Seventh Circuit on the grounds that the phrase "aborted alive" is unconstitutionally vague in the context of a criminal

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29. Plaintiffs also argue that if the definition of viability in Section 2(2) already incorporates an "objective" medical certainty standard, then Section 5(1), because it employs the term "viable," should only need to provide that the physician "must certify" the fetus not viable. The language requiring certification of viability "with reasonable medical certainty" is rendered superfluous, say plaintiffs, by this Court's interpretation of Section 2(2).

provision.[30] This Court relied upon similar reasoning to enjoin Section 6(3) which refers to use of a fetus or "premature infant aborted alive."[31] The arguments raised presently by defendants were rejected earlier by the Court of Appeals,

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I do not agree. it is true that a Court should be loathe to find statutory language redundant or superfluous. See Colautti, 439 U.S. at 392, 99 S.Ct. at 684. However, the Court also must endeavor to interpret statutes in such a way as to find them constitutional, if that is possible. See, e.g., Atwell v. Merit Systems Protection Bd., 670 F.2d 272, 286 (D.C.Cir.1981). In this case, the two arguably redundant clauses were not found directly in the same sentence as they were in Colautti; no redundancy was immediately obvious to a reader of Section 5(1), and would become evident only after referring back to the definition found in Section 2(2). More importantly, my interpretation of the relevant language seems most consistent with the plain language of the statute, in contrast to the tortured reading pressed upon the Court in Colautti by appellants.

30. 627 F.2d at 790-91.

31. 579 F.Supp. at 383.

and a permanent injunction must issue against both subsections.

The Seventh Circuit likewise struck down Section 6(6).[32] Regardless of the stage of the woman's pregnancy, the section required physicians to inform the woman of the possibility of "organic pain" to the fetus, when there was a "reasonable medical certainty" that the particular method of abortion to be used would cause such pain. It further provided that in such situations, the doctor must tell the woman of available methods of alleviating or abolishing the fetal pain. Criminal penalties would be imposed if a physician violated the section.

The Appeals Court recognized that this requirement was a "direct burden on the abortion decision." 627 F.2d at 784. The Court found no countervailing evidence

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32. 627 F.2d at 784.

to support any purported State interest in imposing such a burden, noting that "[t]he uncontroverted medical testimony in the record at this stage describes this information as 'medically meaningless, confusing, medically unjustified, and contraindicated, causing cruel and harmful stress to ... patients.'" Id.

[6] Defendants have now submitted affidavits which they apparently hope will remove the constitutional problems found by the Court of Appeals. Their hope is unfounded. Without question, defendants' submission of evidence on this topic does not alter the legal conclusion that the dissemination of such information directly burdens a woman's decision whether to have an abortion. As to the State's interest in disseminating the information, the new evidence at most suggests that there is a difference of

opinion among the medical community regarding fetal pain. It does not affirmatively prove that distribution of the required information would be medically justified. It also therefore does not refute the finding that this section intrudes on the discretion of the pregnant woman's physician.

These conclusions are consistent with that reached by the Supreme Court in Akron. There the Court struck down a regulation requiring a doctor to describe "in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the

presence of external members" (emphasis supplied).[33] The Supreme Court ruled that "much of [that] detailed description ... would involve at best speculation by the physicians."[34] The Court further specifically referenced the District Court's finding that "there was much evidence that it is impossible to determine many of [these] items, ... such as the 'unborn child's' sensitivity to pain."[35] It is thus clear that Section 6(6) is unconstitutional and must be permanently enjoined.

Section 6(7) involves in vitro fertilization. This Court issued a preliminary injunction against it based upon its use of the phrase "human being," a term

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33. ___ U.S. at ___, 103 S.Ct. at 2489 n. 5.

34. ___ U.S. at ___, 103 S.Ct. at 2500.

35. ___ U.S. at ___, 103 S.Ct. at 2500 n. 34.

enjoined as unconstitutional.[36] Defendants correctly point out that plaintiffs have no standing to challenge this section.[37] Thus, although this Court continues to adhere to its view of Section 6(7) on the merits, the matter cannot properly be considered and no injunctive relief can be obtained.

The final three subparts of Section 6 set forth the standard of care which a doctor must follow in particular situations. Section 6(1) and 6(4) were preliminarily enjoined by Judge Flaum because they contained the term "viable," and the statutory defintion of viability had been deemed unconstitutionally vague.

[7] Section 6(4), as amended by H.B. 666, now provides in relevant part:

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36. 579 F.Supp. at 380 n. 5.

37. Memorandum Opinion, November 16, 1979, pp. 6-7.

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of the mother, with or without artificial support.

Thus, the section no longer regulates cases where the fetus might be capable of "more than momentary survival" outside the womb; the "sustained survival" language is utilized instead.

According to plaintiffs, however, this change is insufficient to cure the provision's infirmities. Section 6(4) continues to regulate pre-viability abortions, according to plaintiffs, because

it governs circumstances where there is even "a possibility" of sustained survival. To be consitutional, only post-viability abortions can be regulated, and those cases occur only when the attending physician determines "In [his] medical judgment ... based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support." See §2(2) (definition of viability) (emphasis supplied). Thus, as plaintiffs read Section 6(4), the State has carved out a space of time prior to viability in which it attempts to dictate how a physician must perform an abortion. Criminal sanctions arise for a failure to follow these dictates, thereby impermissibly imposing a direct obstacle on the abortion decision. See Colautti v. Franklin, 439 U.S. 379, 386 n. 7, 96

S.Ct. 675, 681 n. 7.

Defendants respond that the section "does not purport to regulate pre-viability abortions." Rather, they argue, Section 6(4) "simply acknowledges that the physician cannot easily determine whether or not the fetus is viable--that the physician might mistake the fetus who can maintain life separate from the mother from a fetus who cannot, yet employ methods to terminate pregnancy that would make survival of a fetus who is actually viable impossible or improbable. Section 6(4) merely maximizes the opportunity for survival of a fetus who is in fact viable, but who cannot be diagnosed as viable with certainty while in the womb." Defendants' Memorandum, October 31, 1983, p. 3.

Defendants' argument disproves itself. Clearly defendants agree that two distinct circumstances are being regulated

by the State. Under Section 6(1), a physician must exercise a certain degree of care when he knows that the fetus is viable. The Act itself states that that stage of "viability" is reached when there is a "reasonable likelihood" of the fetus' sustained survival.

In contrast, under Section 6(4) the State wishes to cover another stage, in addition to that described in Section 6(1): a stage at which the doctor has less certainty that the fetus can survive. That stage clearly encompasses, by defendants' own admission, both those circumstances when the doctor believes that the fetus is reasonably likely to be capable of sustained survival and those in which he reasonably believes it may not be so capable.

It is hard for me to understand how defendants can offer the foregoing

description of Section 6(4) and simultaneously maintain that it does not attempt to regulate pre-viability abortions. Apparently defendants want the Court to distinguish between the point of viability after which abortions can be regulated and the point at which a physician, in his medical judgment concludes that a fetus is viable. Defendants wish to view viability as an absolute concept, a point in time after which the State can regulate abortions, whether or not a doctor has recognized the reasonable likelihood that this critical point has been reached.

Defendants cannot constitutionally prevail in their view. As was discussed previously, the courts and the Illinois legislature have both recognized that the point of viability cannot be defined in any absolute sense, devoid of any input by a physician. The opposite is true.

Viability is a medical question, to be determined by a physician in each individual case based on the doctor's assessment of the fetus' "reasonable likelihood" of "sustained survival." Section 6(4) does attempt to regulate pre-viability abortions, by imposing criminal sanctions on a physician for conduct engaged in during that stage. It is therefore clearly unconstitutional, Colautti v. Franklin, 439 U.S. at 386 n. 7, 96 S.Ct. at 681 n. 7, and must be permanently enjoined.[38]

Section 6(1), in contrast, no longer contains constitutional infirmities and

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38. Despite defendants' arguments, Wynn is not to the contrary. The entire discussion referenced by defendants in that case involved the regulation of post-viability abortions only. The statute at issue there contained a constitutional definition of viability and no other statutory language attempted to regulate pre-viability abortions. 449 F.Supp. at 1320, 1321 n. 5.

now may stand. The major objection raised by plaintiffs to this section is again premised upon the Colautti subjective/objective ambiguity discussed supra. Plaintiffs assert that a physician is charged with applying the same standard of care at two different stages of gestational development: when a fetus is known to be viable, under Section 6(1), and when there is a mere "possibility ... of more than momentary survival," under Section 6(4).

Plaintiffs' argument loses all persuasive power once Section 6(4) has been declared unconstitutional, as it has been here: a physician can no longer be confused by any inconsistencies between the two sections, because Section 6(4) will be stricken. More fundamentally, it is hard to understand why doctors would have been confused in any event. Unlike the

situation in Colautti, where it was unclear which of two different standards would be operative in two different situations, here the two sections "impose precisely the same standard of care on the physician for obviously different stages of fetal development."[39] Rather than causing confusion, the legislation arguably alleviates it. Regardless of which of the two stages of development had been reached by the fetus, the doctor would simply apply the one required standard of care. Finally, it must be noted that this section has already withstood the scrutiny of this Court and the Court of Appeals. For the reasons articulated

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39. This is plaintiffs' characterization of the two sections. "Plaintiffs' Joint Reply Memorandum in Support of Motion for Preliminary Injunction," November 9, 1979, p. 25.

here and in the earlier rulings,[40] Section 6(1) is constitutional. The preliminary injunction entered against it shall be dissolved.[41]

The Seventh Circuit has held that plaintiffs do not have standing to challenge either Section 7 or Section 8.[42] This Court therefore may not enter injunctive relief as to those sections.

Section 9 prohibits the use of saline amniocentesis after the end of the first trimester. Judge Flaum entered a

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40. Wynn v. Scott, 449 F.Supp. at 1320-22, aff'd sub nom. Wynn v. Carey, 599 F.2d at 194.

41. Plaintiffs maintain that Section 6(5) would be rendered meaningless if both Sections 6(1) and 6(4) were enjoined. However, because Section 6(1) has not been enjoined, no permanent injuncion shall issue as to 6(5).

42. 627 F.2d at 791.

preliminary injunction against this section[43] which defendants concede should be made permanent.

[8] Section 10 involves various reporting requirements required by the State. Judge Flaum refused to enter a preliminary injunction against the section as a whole,[44] relying in part on the fact that a more limited version of the statute had been upheld earlier in Wynn v. Scott, 449 F.Supp. at 1326-1327, aff'd sub nom. Wynn v. Carey, 599 F.2d at 194. Certain other subparts of Section 10 were enjoined by Judge Flaum, the Court of Appeals, and this Court because they referenced or incorporated other

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43. Memorandum Opinion, November 16, 1979, pp. 26-27.

44. Memorandum Opinion, November 16, 1979, pp. 27-29.

unconstitutional sections of the statute.[45]

Since the entry of Judge Flaum's order, amendments to Section 10 have been enacted. After considering the effect of these changes on the section and the numerous subsections which have already been stricken, I find that the entire section should be permanently enjoined and redrafted by the legislature.

The constitutional standards for assessing recordkeeping provisions are clear. In Danforth, Akron, and Ashcroft[46] the Supreme Court has stated,

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45. Memorandum Opinion, November 16, 1979, p. 29 n. 20 (§§10(i), (j), (l) [in part]); 627 F.2d at 784-86, 792 n. 36 (§§10(k), (o) [in part]); 579 F.Supp. at 383 (§10(n) incorporated §3.1(b), enjoined by this Court). The amendment to the definition of "viability" affects only §10(i).

46. Planned Parenthood, Kansas City, Mo. v. Ashcroft, ___ U.S. ___, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983).

as a threshold matter, that "[r]ecord-keeping and reporting requirements that are reasonably directed to the preservation of maternal health" are constitutionally permissible. Danforth, 428 U.S. at 80, 96 S.Ct. at 2846. However, as the Akron decision held, the "decisive factor" in allowing such regulation is whether "the State [meets] its burden of demonstrating that [the] regulations furthered important health-related State concerns." ___ U.S. ___, 103 S.Ct. at 2481 (emphasis supplied).

Moreover, even if the State shows that the required records serve important maternal health-related State concerns, it must also prove that the records neither infringe upon the "patient's confidentiality and privacy" nor impose a needless "extra layer and burden of regulation" upon her doctor. Danforth, 428

U.S. at 80, 96 S.Ct. at 2846. If either of these tenets were violated, the statute would impermissibly infringe upon the woman's right to choose to have an abortion.

The Supreme Court applied the foregoing principles to the recordkeeping statute at issue in Danforth, and concluded that although the provisions there were "perhaps approaching impermissible limits," they were "not constitutionally offensive in themselves." Id. at 81, S.Ct. at 2846. The Court cautioned that it assumed that the Missouri Division of Health would not interpret and implement the provisions in any way which would "accomplish, through the sheer burden of recordkeeping detail, what we have held to be an otherwise unconstitutional restriction." Id. It also stated that it had specifically relied upon "[t]he added

requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length," to "assist and persuade us in our determination of the constitutional limits." Id. (emphasis supplied). The Court re-emphasized the importance of these factors in Ashcroft this year. Ashcroft, ___ U.S. at ___, 103 S.Ct. at 2524 n. 14, quoting Danforth, 428 U.S. at 81, 96 S.Ct. at 2847-2847.

The Wynn Court also upheld a record-keeping statute, the predecessor statute to the one at issue today. The Court reasoned that the seven items required by the Act were not unconstitutionally burdensome because the information could be assembled quickly and recorded on forms. The information sought would be "useful in learning about the impact of

abortion on maternal health," an appropriate State goal. And, as in Danforth, the Wynn Court assumed that the Illinois Department of Health would not interpret the section so as to require a burdensome amount of detail. Wynn v. Scott, 449 F.Supp. at 1327.

The Wynn Court did find one element of the section unconstitutional: that which provided that the abortion report would be kept confidential, "except as otherwise provided by law," and which incorporated the requirement of a fetal death report for each abortion performed after 20 weeks of gestation. This portion of the statute violated a woman's right to confidentiality, said the Court. It required reporting the woman's name, and "[m]ost damaging," it would be "available upon request to a number of persons other than state officials

compiling statistics." Such a possibility of disclosure "is far from innocuous"; it could indirectly interfere with what should be a "woman's independence in deciding whether to have the abortion." Id. at 1327-1328. These provisions were therefore unconstitutional.

A comparison of the record-keeping provisions at issue in Danforth, Wynn and this case immediately makes clear that Section 10 of the present Act demands much more information from a physician and affords much less protection to a woman's privacy interests than either of the constitutional statutes. For example, the amended version of Section 10 no longer requires simply the seven pieces of straight-forward factual data required by the legislation upheld in Wynn. Section 10 now requires a physician to fill out two separate forms and

demands, on each, fifteen specified pieces of information, including "medical indications" and the "basis" for certain judgments and actions.

The range of persons who will have access to these records, and the use to which the collected information may be put is also far broader than that permitted under the carefully drawn confidentiality provisions upheld in Danforth. In contrast to the narrowly circumscribed provision at issue there, allowing only public health officers to see the records, the instant statute as now amended would allow distribution of the "redacted" copy[47] to the public at large. While the patient's name would not be specified in

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47. The "Redacted Copy" shall be identical in all particulars to the "Original Report" except that the patient identification number, attending physician's name, and facility where the abortion was performed shall be omitted.

these redacted copies, for a citizen residing in a small Illinois town, publication of information including her residence, date of birth, race and marital status could effectively identify her to her entire community. Clearly, such a result has never been and can never be tolerated by the Court because of its patent affect on a woman's protected decision whether to have an abortion. See Wynn v. Scott, 449 F.Supp. at 1328.

The Act also now allows distribution of all of the information in the original copy "to another state agency required or authorized to conduct investigations of professional or business practices in hospital, ambulatory surgical treament center, or other facility" (sic) (emphasis supplied). Although investigatory State agencies "shall not disclose individual patient information publicly," and "[a]ll

reports received by the Department shall be kept confidential and shall be used only for statistical purposes," the statutory language further provides a broad exception to the foregoing: "except to the extent necessary to secure the rights or interests of a person or the State pursuant to a court order in civil or criminal actions or proceedings to grant or revoke licenses." Not only has the legislature gone far beyond the narrow "public health officials" language which the Danforth Court acknowledged to be "approaching impermissible limits." By its broad references to "professional or business practices" of any "facility" and licensure proceedings, the legislature has exceeded any needs reasonably related to the State's interest in preserving maternal health. The effective--and perhaps intended--result of the broadly

phrased distribution provisions is to infringe on a woman's abortion decision. This infirmity, when coupled with the more onerous administrative burden placed on physicians by this statute, makes clear that Section 10 is unconstitutional.

Finally, I see no purpose in trying to retain certain disjointed lines or subparts of Section 10. Given the numbers of parts which have already been preliminarily enjoined, the additional concerns expressed herein regarding the recently amended portions of the section, and the way in which the legislators structured their drafting of the section, I conclude that an injunction against the entire section should be entered.

[9] Section 11 sets forth penalties for certain types of unprofessional conduct. Plaintiffs have not challenged subsection (a). Section 11(b) is

rendered meaningless because it references other provisions which have been permanently enjoined. As to Section 11(c), I concur with plaintiffs' view that it is drafted too broadly. It could be read as prohibiting a doctor from receiving a fee from a patient for services rendered, and then referring her to another doctor or clinic for an abortion. What the subsection was apparently intended to do is prohibit a doctor from receiving a referral fee from another doctor or clinic. This legitimate purpose is accomplished by the more carefully worded amendment to the Act, Section 11.1. Accordingly, Section 11(c) will be permanently enjoined.

Section 11(d) was enjoined by the Seventh Circuit. That Court concluded that by its "use of the term 'abortifacient' in describing certain birth

control methods [Section 11(d)] forces the physician to act as the mouthpiece for the State's theory of life."[48] Although defendants now contest this reasoning, I have neither the inclination nor the authority to dispute the Appeals Court on this matter, and therefore enter a permanent injunction as to Section 11(d).[49]

Section 11(e) was previously enjoined

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48. 627 F.2d at 789.

49. Defendants have submitted affidavits from women who state that they would want to be told whether the birth control method prescribed for them was an abortifacient. While this evidence does speak to the affiants' preferences, it does not refute the evidence supplied by plaintiffs and referenced by the Seventh Circuit that "this requirement is confusing and needlessly painful" at least as to certain other patients besides defendants' affiants. More fundamentally, the Seventh Circuit enjoined Section 11(d) because it impermissibly forced the doctor to espouse the State's theory of life. Defendants' new evidence does not affect that rationale at all.

by this Court on the grounds that the patient's name should not be disclosed.[50] I continue to see no legitimate compelling state interest which is furthered by this requirement and therefore see no justification for sanctioning it, regardless of the criminal penalties which would attach to any improper use of that information. Section 11(e) is therefore permanently enjoined. I likewise see no reason to alter my previous conclusion regarding Section 11(f)[51] and therefore also enter the permanent injunction against it.

The final section of the Act challenged by plaintiffs is Section 12, regarding pathological testing of the fetus. Although this provision is no longer rendered infirm by its incorporation of the

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50. 579 F.Supp. at 384.

51. 579 F.Supp. at 384.

term "viability,"[52] the section continues to be unconstitutional because it employs the phrase "live birth." For the reasons expressed in this Court's earlier opinion,[53] a permanent injunction shall issue against Section 12.

Section 14(2), like Sections 5(3) and 11(b) has been rendered meaningless and will be permanently enjoined.

The only remaining issue for resolution is whether the entire Act should be enjoined, as plaintiffs request. Without question, the permanent injunction entered today significantly affects major portions of the Illinois Abortion Act of 1975, as amended. I also agree with plaintiffs that the Akron Court indicated that a "clause-by-clause" parsing of a statute into disjointed pieces was inappropriate

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52. See note 9, supra.

53. 579 F.Supp. at 383-384.

in certain circumstances.[54] However, I further note that the Supreme Court did not invalidate the entire statute in Akron even though major sections of that law were held to be unconstitutional. To do so either there or in this case would be to completely ignore the legislators' intention as expressed in the severance clauses of the statutes.[55] I therefore

54. See discussion supra.

55. Plaintiffs also argue that the Preamble evidences the legislators' unlawful purpose in enacting the statute, and therefore shows that the entire Act must be enjoined. In particular, plaintiffs point to the State interests espoused and object to these as being beyond the scope of interests which the Supreme Court has said states may legitimately protect in abortion legislation.

I did not find the Preamble unconstitutional and will not premise a injunction of the entire law on that theory. An evaluation of a statute's constitutionality does not end with a review of the "interests" recited in a preamble by legislators. What is critical in assessing constitutionality is not the list of areas

decline to enter the permanent injunction against the entire Act.

A permanent injunction shall issue against the following sections: 2(8), 2(9), 2(10), 3.1(B), 3.2(A)(1), 3.2(B), 3.2(C), 3.3, 3.4, 3.5, 4, 5(3), 6(2), 6(3), 6(4), 6(6), 9, 10, 11(b), 11(c), 11(d), 11(e), 11(f), 12, 14(2).

It is so ordered.

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in which the State proclaims itself to have a legitimate interest in protecting, but what interests the courts and Constitution will recognize as legitimate and compelling in the circumstances.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

NOTICE OF APPEAL

Notice is hereby given that Intervening Defendants Eugene F. Diamond, M.D. and Jasper F. Williams, M.D. hereby appeal to the U.S. Court of Appeals for the Seventh Circuit from those portions of the final judgment entered on Oct. 14, 1983, as amended by the order entered on Nov. 2, 1983 declaring unconstituti al and permanently enjoining §§2(10), 6( ) and 11(d) of the Illinois Abortion Law of 1975, as amended, and from those portions of the Memorandum Opinion of May 13, 1983 granting Plaintiffs' Motion to Strike Defendants' Affidavits and Appendices as to Appendix 2 of Intervening Defendants' Motion for Summary Judgment and denying

Intervening Defendants' motion to file a copy of the Chicago Sun-Times series The Abortion Profiteers.

EUGENE F. DIAMOND, M.D.
JASPER F. WILLIAMS, M.D.

By: /S/
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(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

NOTICE OF CROSS-APPEAL

Notice is hereby given that Plaintiffs hereby cross-appeal to the United States Court of Appeals for the Seventh Circuit from that portion of the final judgment in this action which denies declaratory and injunctive relief against §6(1) of the Illinois Abortion Law of 1975, as amended by order entered November 2, 1983.

/S/
One of Plaintiffs' Attorneys

Charles v. Carey

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[SEAL]

OFFICE OF THE STATE'S ATTORNEY
Cook County, Illinois
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RICHARD M. DALEY
State's Attorney

January 17, 1984

The Honorable Thomas F. Strubbe
Clerk of the Court
United States Court of Appeals
for the Seventh Circuit
27th Floor
219 South Dearborn Street
Chicago, Illinois 60604

Re: Allan Charles, M.D., et al.
v. Richard M. Daley, et al.
Docket Nos. 83-3175, 83-3176,
83-3177 and 83-3253

Dear Mr. Strubbe:

Pursuant to Rule 28(i) of the Rules of Appellate Procedure, defendant-appellant Richard M. Daley hereby adopts as his own all of the brief filed on January 13, 1984, by Eugene F. Diamond, M.D., and Jasper F. Williams, M.D., intervening defendants-appellants, with the exception

of Part III of that brief, pages 13 through 23.

A copy of this letter is being sent to all counsel of record in this appeal.

Very truly yours,

RICHARD M. DALEY
State's Attorney of Cook County

By: /S/
Robert J. Tonos
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(312) 443-4553
Defendant-Appellant

RJT:dh
cc: Attached

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[SEAL]

NEIL F. HARTIGAN
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STATE OF ILLINOIS

January 24, 1983

Thomas F. Strubbe
Clerk of the Court
United States Court of Appeals
for the Seventh Circuit
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Chicago, IL 60604

RE: Allan G. Charles, M.D., et al.,
v. Richard M. Daley, et al.,

Hope Clinic v. Richard M. Daley,
et al.,
Docket Nos. 83-3175, 83-3176,
83-3177 and 83-3253

Dear Mr. Strubbe:

Please take notice that pursuant to Rule 28(i) of the Rules of Appellate Procedure, defendant-appellant Neil F. Hartigan, Attorney General of Illinois, adopts by reference the brief filed on January 13, 1984 by the intervening defendants-appellants, with the exception

of Part III of that brief, pages 13 through 23.

Should you have any questions, please contact me.

Very truly yours,

/S/
KATHLEEN KREISEL
Assistant Attorney General
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cc: Merle L. Royce
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[AMERICANS UNITED FOR LIFE
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Judicial Notice Pursuant
to Circuit Rule 11

RE: Charles v. Daley, Nos. 83-3175, 83-3176, and 83-3177

On June 30, 1984, Illinois House Bill 1399, Illinois Public Act No. 83-1128 (1984), which amended the "Illinois Abortion Law of 1975," Ill. Rev. Stat. Ch. 38, §81-21 through §81-68.4 (1984), became law. A copy is attached to this correspondence.

Two provisions of the "Illinois Abortion Law of 1975" that are presently on appeal before this court in Charles v. Daley, §§6(1) and 6(4), were amended by Public Act No. 83-1128.

In the "Intervening Defendants' Opening Brief," the discussion of §6(4) appears at page 1-5.

In the "Joint Brief of Plaintiffs-Appellees/Cross Appellants," the discussion of §6(1) appears at pages 17-22. The discussion of §6(4) appears at pages 17 and 22-24.

In the "Intervening Defendant-Appellants-Cross-Appellees Reply Brief," the discussion of §6(1) appears at pages 8-11. The discussion of §6(4) appears at pages 11-14.

Sections 2(10) (definition of abortion) and 11(d) (abortifacient labeling) of the "Illinois Abortion Law of 1975," which are also subjects of appeal in Charles v. Daley, were not amended by Public Act No. 83-1128. Nevertheless, two definitions which relate to arguments raised in Daley concerning §§2(10) and

11(d) were affected: the definition of human being (formerly §2[8]) was deleted; §2(6) (definition of fetus) was substantially amended.

In the "Intervening Defendants' Opening Brief," discussion of the use of the term "human being" appears at page 9.

In the "Joint Brief of Plaintiffs-Appellees/Cross Appellants," discussion of the term "human being" appears at page 24, n.11.

Illinois Public Act No. 83-1128 and the "Illinois Abortion Law of 1975" that it amends are subjected to present litigation in Keith v. Daley, No. 84-C-5604 (N.D. Ill., filed July 1, 1984). District Judge John A. Nordberg entered a Temporary Restraining Order enjoining the operation of Public Act No. 83-1128 on July 1, 1984.*

Respectfully submitted,

/S/
Thomas J. Marzen
Counsel for Intervening
Defendant-Appellants-
Cross-Appellees

---

*Note that on pages 16-18 of Illinois Public Act No. 83-1128 also amends provisions of the "Illinois Parental Notice to Abortion Act," Ill. Rev. Stat., Ch. 38, §81-51 through §81-68.4 (1984, which is the subject of a separate appeal in Zbaraz v. Hartigan, 84-1958 and 84-1959, that is presently before this court.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 84-1379

Eugene F. Diamond, M.D., et al.,
Appellants,

v.

Allan G. Charles, M.D., et al.,
Appellees.

Appeals -- Jurisdiction Noted

In this case probable jurisdiction is noted. The case is set for oral argument in tandem with No. 84-495, Thornburgh v. American College of Obstetricians and Gynecologists.

Dated: May 20, 1985

Office - Supreme Court, U.S.
FILED
JUL 15 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,

Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,

Appellees,

AND

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,

Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

Brief of Appellants Eugene F. Diamond, M.D. and Jasper F. Williams, M.D.

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July 15, 1985

CHAS. P. YOUNG CHICAGO

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the State of Illinois may require physicians who prescribe or administer abortifacients to inform their patients that they have done so, when the physician is given broad discretion in determining the manner in which that information is conveyed to the patient?

2. Whether a justiciable case or controversy was present in this facial challenge to Sections 6(1) and 6(4) of the Illinois Abortion Law when the relevant statutory provisions had been amended?

3. Whether the court of appeals, if it did not err in addressing the unamended version of Section 6(1), nevertheless erred in disregarding settled precedent on statutory construction and vagueness to strike down a statute that established a standard of care applicable to viable fetuses?

4. Whether the State of Illinois may further its compelling interest in protecting fetal life by requiring a standard of care applicable to any fetus when there is a possibility of his or her sustained survival outside the womb?

No. 84-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,

Appellants,

VS.

ALLAN G. CHARLES, M.D. et. al.,

Appellees,

AND

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,

Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

Brief of Appellants
Eugene F. Diamond, M.D.
and Jasper F. Williams, M.D.

Appellants, Eugene F. Diamond, M.D., and Jasper F. Williams, M.D., appeal from the final judgment of the United States Court of Appeals for the Seventh Circuit, dated November 30, 1984, holding that Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law unconstitutionally infringed upon a woman's fundamental right of privacy as secured by the Fourteenth Amendment of the Constitution.*

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* In addition to the parties named in the caption, the following were also parties to the proceedings in the court below: Neil F. Hartigan, Attorney General for the State of Illinois, Richard M. Daley, State's Attorney for the County of Cook, Marvin Rosner, M.D., David Zbaraz, M.D., Martin Motew, M.D., Hector N. Zevallos, M.D., National Health Care Services of Peoria, Inc., Arthur C. Watson, M.D., and Robert C. Steptoe, M.D. All of these parties are appellees in this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,

Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,

Appellees,

AND

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit permanently enjoining Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law, which appears in the appendix to the Jurisdictional Statement, App. 1-49, is reported at 749 F.2d 452 (7th Cir. 1984).

The opinion of the District Court for the Northern District of Illinois permanently enjoining sections 2(10), 6(4) and 11(d) of the Illinois Abortion Law, which appears in the Joint Appendix at 77-130, is reported at 579 F.Supp. 464 (N.D. Ill. 1983).

The opinion of the District Court for the Northern District of Illinois issuing a preliminary injunction against certain sections of the Illinois Abortion Law on renewed motion for

preliminary injunction is reported at 579 F.Supp. 377 (N.D. Ill. 1983).

The opinion of the Court of Appeals for the Seventh Circuit granting a preliminary injunction against certain sections of the Illinois Abortion Law is reported at 627 F.2d 772 (7th Cir. 1980).

The opinion of the District Court for the Northern District of Illinois issuing a preliminary injunction against certain sections of the Illinois Abortion Law is not reported, but is printed in the Appendix to Appellees' Motion to Dismiss or Affirm.

JURISDICTION

The final judgment of the Court of Appeals for the Seventh Circuit holding Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law unconstitutional as violative of the Fourteenth Amendment of the Constitution was entered on November 30, 1984. Suit was brought pursuant to 42 U.S.C. § 1983. Notice of appeal to this Court was duly filed in the Court of Appeals for the Seventh Circuit on February 28, 1985. This appeal is being docketed within 90 days of the entry of final judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend XIV, § 1

Ill.Rev.Stat. Ch. 38, ¶ 81-22(10) (1983)

Ill.Rev.Stat. Ch. 38, ¶ 81-26(1) (1983)

Ill.Rev.Stat. Ch. 38, ¶ 81-26(1) (1984 Supp.)

Ill.Rev.Stat. Ch. 38, ¶ 81-26(4) (1983)

Ill.Rev.Stat. Ch. 38, ¶ 81-26(4) (1984 Supp.)

Ill.Rev.Stat. Ch. 38, ¶ 81-31(d) (1983)

Ill.Rev.Stat. Ch. 38, ¶ 81-22(9) (1983)

Ill.Rev.Stat. Ch. 38, ¶ 81-22(6) (1984 Supp.)

Ill.Rev.Stat. Ch. 38, ¶ 81-26(5) (1983)

The text of these provisions is set forth in the appendix to this brief.

STATEMENT OF THE CASE

This is an appeal from a decision of the United States Court of Appeals for the Seventh Circuit granting a permanent injunction against Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law of 1975, as amended. Jurisdictional Statement (J.S.) at App. 1.

On October 30, 1979, the appellees filed a complaint in the United States District for the Northern District of Illinois for declaratory and injunctive relief against enforcement of S.B. 47, a bill amending the Illinois Abortion Law of 1975, that had been passed that same day by the General Assembly of Illinois. Suit was filed against the Attorney General of Illinois and the State's Attorney for the County of Cook, as representative for the class of State's Attorneys in Illinois. On November 13, 1979, then-District Judge Flaum granted the motion of appellants Eugene F. Diamond, M.D., and Jasper F. Williams, Sr. M.D., to intervene as defendants in this matter.

On November 16, 1979, Judge Flaum entered an order granting in part and denying in part plaintiffs' motion for a preliminary injunction against the enforcement of S.B. 47 in its entirety. Among the provisions enjoined by the court were Sec. 6(1) and Sec. 6(4). These provisions were enjoined because they incorporated a definition of viability that was held to be invalid by the court. Among the provisions upheld were Sec. 2(10), which is a definition of abortifacient, and Sec. 11(d), which requires physicians who prescribe abortifacients to inform their patients that they are doing so. The court of appeals reversed the judgment with respect to

Secs. 2(10) and 11(d), and entered a preliminary injunction against those sections. *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980) (*Charles I*).

Appellees' Renewed Motion for Preliminary Injunction was granted in part and denied in part by District Judge Kocoras on July 14, 1983. *Charles v. Carey*, 579 F.Supp. 377 (N.D.Ill. 1983) (*Charles II*). None of the sections now on appeal was the subject of that ruling. Illinois House Bill 666, which amended the definition of viability that had been enjoined by Judge Flaum and certain language of § 6(4), became law on September 17, 1983, after briefing had been completed on cross-motions for summary judgment. Judge Kocoras' decision of October 14, 1983, as amended on November 2, 1983, issued a permanent injunction against §§ 2(10), 11(d) and 6(4), but upheld § 6(1) and dissolved the preliminary injunction that had been entered against it. *Charles v. Carey*, 579 F.Supp. 464 (N.D.Ill. 1983) (*Charles III*) Joint Appendix (J.A.) at 77.

On December 2, 1983, defendants Daley and Hartigan and appellants timely filed separate motions of appeal from those aspects of the final judgment permanently enjoining Secs. 2(10), 11(d) and 6(4). On December 16, 1983, appellees cross-appealed from the District Court's refusal to issue a permanent injunction against Sec. 6(1).

On June 30, 1984, after the issues were fully briefed in the court of appeals but before oral argument, the General Assembly enacted H.B. 1399. That bill amended several sections of the Illinois Abortion Law, including §§ 6(1) and 6(4). Appellants notified the court of appeals and appellees of the amendments prior to oral argument and, at oral argument, the court directed the parties to file supplemental briefs on the issue of mootness.

On November 30, 1984, the court of appeals affirmed the entry of a permanent injunction against Secs. 2(10) and 11(d). The court also ruled that the amendments to Secs. 6(1) and 6(4) did not moot those issues and proceeded to rule upon the constitutionality of those provisions in their unamended versions. The court reversed the denial of an injunction as to Sec. 6(1) and affirmed the injunction against Sec. 6(4). *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984) (*Charles IV*). Appellants filed their notice of appeal with the court of appeals and their Jurisdictional Statement in this Court on February 28, 1985. This Court noted probable jurisdiction on May 20, 1985.

SUMMARY OF THE ARGUMENT

The State of Illinois has indicated a desire to regulate abortion in a manner protective of both maternal health and fetal life. While Illinois seeks to regulate abortion to the greatest extent permissible, it has stated its intent to do so in a manner consistent with *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. Ill.Rev.Stat. ch. 38, ¶ 81-21 (1983). The provisions on appeal were enacted to protect maternal health and fetal life and they do so in a manner that is consistent with the prior decisions of this Court.

Sections 2(10) and 11(d) protect the right of women to choose not to use abortifacients by requiring physicians who prescribe them to inform their patients that they are doing so. The precise manner in which the doctor discloses this information is left entirely to his discretion.

The Seventh Circuit's decision striking down §§ 2(10) and 11(d) is in direct conflict with the decisions of this Court and acts impermissibly to restrain the State of Illinois from enacting legitimate health regulations pursuant to its police powers.

This Court has held that women have a fundamental right to choose not to have an abortion. *Maher v. Roe*, 432 U.S. 464 (1977). It has also upheld the right of States to protect a woman's choice by requiring that her consent be obtained

prior to the performance of an abortion upon her. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). Since it is impossible for a woman to choose not to use a drug or device which causes abortion if she is unaware that one is being offered to her, she must be informed when such drugs and devices are administered to her. Many women would use contraceptive methods of birth control but would never use abortifacients because they believe that the fetus should be valued from the time of fertilization forward. Failure to inform those women that an abortifacient is being administered to them would violate their freedom of choice.

Furthermore, it is clear that some physicians, including appellees, would prefer not to inform women of the abortifacient effect of drugs and devices that they prescribe and administer. Also, medical journals and the popular press often blur the distinction between abortifacients and contraceptives by referring to both as "contraceptives." Reference to drugs and devices which induce abortion at early stages of pregnancy as "contraceptives" is inaccurate and misleading since contraception is the artificial prevention of the fertilization of the human ovum. The State may, pursuant to its police powers, regulate its licensed professionals in a manner that prevents the dissemination of such deceptive and misleading information. *Zauderer v. Office of Disciplinary Counsel,* 105 S.Ct. 2265 (1985).

The court of appeals erred in construing §§ 2(10) and 11(d) to require that a physician inform his patient that "abortifacients cause the death of unborn children." Those provisions do not require any such thing. Rather, they leave broad discretion to the physician in his choice of words. Thus, they do not foist a theory of life upon the physician and his patient. Moreover, these provisions do not burden any fundamental right. The only possible burden that these sections might impose would be to make women who would like to use abortifacients, but would prefer to do so in ignorance, realize what they are doing. Women do not have

a fundamental right to obtain abortions in ignorance. The State need not abandon its compelling interest in protecting women from unwittingly submitting to abortions simply because some women might wish to use abortifacients in ignorance. The fundamental right to choose not to use an abortifacient outweighs any right to use abortifacients in ignorance.

Sections 6(1) and 6(4) were amended prior to the court of appeals' decisions. The court of appeals should not have reviewed those sections as they stood prior to amendment because there was no reasonable likelihood that they would be reenacted and no continuing adverse effect of the alleged violation exists. Also, federal courts should review lower court holdings in light of presently existing law, not the law that was in effect when the judgment below was rendered. *Fusari v. Steinberg,* 419 U.S. 379 (1975). A live case or controversy existed with respect to those sections, as amended, since the legal issues remained the same and no factual issues were in dispute. The court of appeals should have reviewed the amended provisions and so should this Court.

Whether the amended or unamended version of § 6(1) is reviewed, it is constitutional. The State has a compelling interest in protecting the viable fetus. *Roe*, 410 U.S. at 164. The State may regulate abortions performed on viable fetuses by requiring that a standard of care be used to protect the life of the fetus when no increased risk to the mother would be caused. Neither the amended nor unamended version is vague on its face. The good faith viability determination of the physician performing the abortion is final under both versions. And, the conduct required of the physician is not difficult to understand—physicians routinely apply the standard of care applicable to their specialty. Since these provisions are not vague, are supported by a compelling interest in protecting fetal life, and have no impermissible chilling effect on doctors or their patients, they are constitutional.

Section 6(4) requires that the method of abortion most likely to preserve fetal life be used when, in the physician's judgment, there is a possibility of fetal survival. It does not apply when the fetal survival method of abortion would increase risk to the mother. Nor does it prohibit any abortion. In short, it does not restrict the woman's ability to obtain an abortion in any way. She remains free to consult with her doctor and to legally terminate her pregnancy for whatever reason they decide upon.

Since a woman does not have a right to terminate her pregnancy in a manner that ensures fetal death, the fact that this provision prevents her from doing that does not violate her rights. In addition, the State has a compelling or, at least, very substantial interest in protecting fetal life when there is a possibility that the fetus can survive. Given the importance of the State's interest and the lack of burden imposed on the woman by § 6(4), it is constitutional.

ARGUMENT

I. THE STATE OF ILLINOIS MAY REQUIRE PHYSICIANS WHO PRESCRIBE OR ADMINISTER ABORTIFACIENTS TO INFORM THEIR PATIENTS THAT THEY HAVE DONE SO, WHEN THE PHYSICIAN IS GIVEN BROAD DISCRETION IN DETERMINING THE MANNER IN WHICH THAT INFORMATION IS CONVEYED TO THE PATIENT.

The State of Illinois has determined that it is necessary to protect the right of its female citizens to choose not to use abortifacients. To this end, the State enacted § 11(d) of the Illinois Abortion Law.[1] That section requires physicians

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[1] Section 11(d) states:

> Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument,

(footnote continued on next page)

who administer or prescribe abortifacients to inform their patients that they are doing so. Nothing in § 11(d) requires the physician to describe an abortifacient in any particular manner.[2] He may use whatever language he chooses in describing it. Thus, the State leaves broad discretion to the physician to determine the manner in which the required information will be disclosed to his patient.

The decision of the Court of Appeals for the Seventh Circuit striking down §§ 11(d) and 2(10) is in direct conflict with the decisions of this Court and acts impermissibly to restrain the State of Illinois from enacting legitimate health regulations pursuant to its police powers.

A. The State May Require That Abortifacients Are Administered to Women Only with Their Consent.

1. The Decisions of This Court Support the State's Right to Require that Consent Be Obtained Prior to the Use of Abortifacients.

Women have a right to choose not to have an abortion that is at least as fundamental as the right to choose abortion. *Maher v. Roe*, 432 U.S. 464, 472 n.7 (1977). It is utterly impossible for a women to choose not to submit to an abortion

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(footnote continued from preceding page)

> medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for which it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

Ill.Rev.Stat. ch. 38, ¶ 81-31, § 11(d) (1983). Section 11(d) was renumbered as § 11(3) by House Bill 1399. Ill.Rev.Stat. ch. 38, ¶ 81-31(3) (1984 Supp.).

[2]Section 2(10) defines "abortifacient" so that doctors will know under what circumstances § 11(d) applies. Section 11(d) does not, however, require physicians to use the term "abortifacient" or to describe an abortifacient by using the language set forth in § 2(10).

if she is unaware that an abortion is being performed upon her or will occur to her. The State has a compelling interest in requiring that women be told when an abortion is about to be performed upon them so that their consent to that procedure may be obtained.

This Court's decisions in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), have upheld the right of States to protect the woman's fundamental right of choice by requiring that her consent be obtained prior to the performance of an abortion upon her. In *Danforth*, the Court held that it is permissible for a State to require a woman's prior written consent to an abortion. In so doing, the Court stated:

> [I]t is desirable and imperative that [the abortion decision] be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State.

428 U.S. at 67. While there are limitations on the amount of information that may be required to be given, it is clearly permissible for the State to require that a woman be informed "as to just what would be done and as to its consequences." *Id.* at 67 n.8. Consistent with *Danforth*, § 11(d) requires that a woman be told just what is being done (a drug or device which is known to cause abortion is being prescribed for her) and what the consequences are (an abortion might result if she is pregnant).

More recently, in *Akron*, this Court stated: "Consistent with its interest in ensuring informed consent, a State may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion." *Akron*, 462 U.S. at 445. Thus, a provision that merely describes in general terms the information to be disclosed is permissible because it leaves the "precise nature and amount of this disclosure to the physician's discretion and 'medical judgment.'" *Id.* at 447.

The principles set forth in *Maher*, *Danforth* and *Akron* govern this case with equal force. Abortifacients, by definition,[3] are drugs and devices which cause abortions when used by pregnant women. Since abortifacients cause abortions, the State's interest in enacting § 11(d) and thereby ensuring that abortifacients are administered only with the woman's informed consent is as important as the State's interest was in *Danforth*. In both instances, the State is ensuring that a woman's consent to an abortion be secured.[4]

Affidavits submitted in the district court by appellants demonstrate that many women believe that the life of the fetus should be valued from the time of fertilization forward. *See* Affidavits of Dianna Shark, Debra Evans, and Mary Gaspar. Joint Appendix (J.A.) at 57-62. These women would use contraceptive methods of birth control but would never knowingly choose to use an abortifacient method of birth control because that would cause the death of an organism already in existence. Plainly, failure to inform a woman who is opposed to abortion that a drug or device being administered to her will cause an abortion would be an egregious violation of her freedom of choice.

On its face, § 11(d) requires no more than is permissible under *Danforth* and *Akron*. It describes in general terms that the doctor must inform his patient that he is prescribing an abortifacient for her if he knows he is doing this. The

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[3] According to Dorland's medical dictionary, an "abortifacient" is "an agent which causes abortion." *Dorland's Illustrated Medical Dictionary* 4 (25th ed. 1974).

[4] The State's interest in enacting § 11(d) may be even more important because there is a greater need for information when a woman is seeking "birth control" rather than an abortion. In *Danforth*, the informed consent provision applied to women who presumably knew they were pregnant and were seeking an abortion. Here, however, § 11(d) applies to women who are seeking birth control and who may never even suspect that an agent which causes an abortion is being prescribed for them.

precise manner in which the doctor discloses this information is left entirely to his discretion. No specific language is required. A physician is free to inform the patient that a drug or device is being prescribed or administered that "prevents birth after fertilization has taken place," that "causes the premature expulsion from the uterus of the products of conception," that "causes an abortion," that "causes fetal death," or that "kills unborn children." The law simply does not penalize the physician for his choice of words. It does, however, penalize him for his intentional failure to inform the woman of the abortifacient effect of the drug or device that is being administered so that she may choose not to use it.

In summary, § 11(d) furthers the State's compelling interest in protecting the fundamental right of women to choose not to use abortifacients. It requires only that women be informed about the effects of drugs and devices that are being prescribed for them. And, it allows the physician the necessary flexibility that *Akron* requires. Therefore, § 11(d) is constitutional under this Court's prior holdings.

2. Under Its Broad Police Powers, a State May Regulate the Medical Profession and Require the Disclosure of Accurate Information That Is necessary to Obtain Consent to the Use of Abortifacients.

The Tenth Amendment to the Constitution reserves to the States broad police powers to protect the health and welfare of their citizens. It is beyond dispute that these police powers extend to regulation of the medical profession. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954). *See also Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) ("the State has broad police powers in regulating the administration of drugs by the health profession").

Through its licensing procedures, the State empowers physicians to give professional advice to women on the choice of birth control they might use. Having placed physicians in this position of responsibility, the State has a right to ensure that they disclose accurate information necessary for a

woman to choose between contraceptive and abortifacient methods of birth control.

Physicians who administer abortifacient methods of birth control do not have a right to do so without the consent of their patient. As with other drugs or devices that a physician may prescribe, the patient has a right to know what their effect will be and to reject their use. Since it is impossible for a woman to give consent to the use of an abortifacient if she does not know that an abortifacient is being prescribed or administered, it is essential that she at least be informed of that fact.

Many forms of "birth control" are practiced in this country today. Some prevent conception and are contraceptives; others prevent birth after conception has taken place and are abortifacients. Yet many still think of "birth control" only as a method of preventing conception since that is its customary usage.[5] They are not aware that both abortifacients and contraceptives are now sometimes considered methods of "birth control." Nor are they aware that some physicians have begun blurring the distinction between abortifacients and contraceptives by referring to both as "contraceptives." Recent articles in medical journals[6] and the popular press show that abortifacients are sometimes called "contraceptives." For example, one article states that two pharmaceutical companies "are both testing a new class of *contraceptives*

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[5] *Webster's New Twentieth Century Dictionary Unabridged* (2d ed. 1983), for example, defines "birth control" as follows: "the act of regulation of childbearing, esp. by contraceptives." *Id.* at 186. Also, "contraception" is "often called 'birth control.'" *Id.* at 396.

[6] *See, e.g.*, Johnson, *Contraception--The Morning After*, 16 Family Planning Perspectives 266 (1984) (referring to drug which prevents implantation of already fertilized ovum as "contraceptive"); *Postcoital Contraception,* 1:8329 Lancet 855 (1983) (suggesting use of term "contraceptive" to describe drug which acts between fertilization and implantation of blastocyst).

that promise to reduce drastically the number of clinic abortions performed each year." Rhein et al., *A Pill that 'Might Defuse the Abortion Issue,'* Bus. Wk., Apr. 1, 1985, at 85 (emphasis added). The next sentence, however, states that "[t]he drugs *induce abortion*, [and] can halt pregnancies in very early stages with minimal side effects." *Id.* (emphasis added).

Some doctors also perform "menstrual extraction" on their patients without informing them of the abortifacient effect such procedures will have if the woman is already pregnant.[7] Dr. Warren Hern, who regularly performs abortions, has pointed out that menstrual extraction is a "euphemism for early abortion," and that the "[u]se of menstrual extraction to deny the emotional implications of pregnancy and the decision to abort is a practice that must be deplored." Hern, *First Trimester Abortion: Complications and Their Management*, in 6 *Gynecology and Obstetrics* 1, 2 (J. Sciarra ed. 1982).

Reference to drugs and devices which induce abortion at early stages of pregnancy as contraceptives is simply inaccurate and misleading. "Contraception" is the "artificial prevention of the fertilization of the human ovum." *Webster's New Twentieth Century Dictionary Unabridged* 396 (2d ed. 1983). Abortifacients do not prevent fertilization and are not contraceptives since they operate after fertilization has taken place. Given the common meaning of contraception, a woman would naturally believe that the "contraceptive" she is receiving prevents fertilization. She would have no reason to suspect that the drug or device was not a contraceptive; that instead, it was something that causes an abortion.

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[7] The deceptive character of such practices is highlighted by the fact that doctors have stated that the use of the term "menstrual regulation" is preferable "in those countries where pregnancy termination is illegal." Laufe, *Menstrual Regulation*, in 6 *Gynecology and Obstetrics* 1 (J. Sciarra ed. 1982). Laufe also suggests that this terminology allows women "to avoid confronting the issue of abortion." *Id.* at 6.

The State is entitled to require disclosure of information that is necessary to prevent deception. While "truthful [information] related to [ ] lawful activities" is entitled to First Amendment protection, "[f]alse, deceptive, or misleading [information] remains subject to restraint." *In re R.M.J.*, 455 U.S. 191, 200 (1982). This is especially true in the case of information disseminated by professionals—in this case, doctors. Such information "poses special risks of deception" since the patient's comparative lack of knowledge makes it likely that she will accept the doctor's description as entirely accurate. *Id.*[8] Because of the great potential for confusion and deception associated with information disseminated by professionals, and the "limited ability of the professions to police themselves," the State has a legitimate interest in regulating the content of their speech in a manner which prevents such abuses. *Id.* at 202. That interest becomes compelling when such deception deprives a woman of her fundamental right to choose not to have an abortion performed upon her.

In *Zauderer v. Office of Disciplinary Council*, 105 S.Ct. 2265 (1985), this Court reaffirmed the above principles, holding that the right of a professional to refrain from "divulg[ing] accurate information regarding his services is not [ ] a fundamental right." *Id.* at 2282 n.14. The Court also stated that the interest in failing to provide factual information is minimal, and it is adequately protected if the disclosure requirements are reasonably related to the State's interest in preventing deception. *Id.* at 2282. Thus, the State has the power to require its licensed professionals to disclose accurate information concerning their services.

Just as in *Zauderer*, the possibility for deception and resulting harm is self-evident in this case. First, it is clear that a number of doctors, including appellees, would prefer not to inform women of the abortifacient effect of drugs and

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[8] Minors, who account for approximately one-third of the abortions performed each year, are especially susceptible in this regard.

devices that they prescribe. Second, it is essential that a woman be given such information in order for her to be able to choose not to use abortifacients. Finally, the failure to inform a woman of the abortifacient effect of a drug deprives her of her fundamental right to continue her pregnancy and may cause her emotional distress when she later learns what has been done to her.

In summary, § 11(d) requires only that accurate information, of the physician's own choosing, be disclosed. It prevents misleading information from being disseminated. It also protects women from unwittingly violating their deepest moral beliefs and thereby incurring psychological harm. Thus, it is a permissible exercise of the State's police power.

B. The Seventh Circuit's Decision Is Contrary to the Decisions of This Court and Infringes Upon the State's Power to Regulate the Medical Profession in a Manner Consistent with the Health and Welfare of Its Citizens.

In spite of the State's compelling interest in protecting the fundamental right of its female citizens to choose between contraceptive and abortifacient methods of birth control, and the fact that § 11(d) requires no more than what is permissible under *Danforth* and *Akron*, the court of appeals struck it down.[9] In so doing, the court failed to give that section principled constitutional analysis. The court's opinion is so cursory that it fails even to articulate the rights that were

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[9]Section 2(10), which is only definitional, was also struck by the court of appeals. However, the court did not give a specific reason for striking this definition. Section 2(10) states:

> "Abortifacient" means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.

Ill.Rev.Stat. ch. 38, ¶ 81-22(10) (1983).

supposedly infringed upon. Nor does it indicate the manner in which this provision supposedly burdens any such rights.

The court apparently struck §§ 2(10) and 11(d) for several reasons. First, they impermissibly impose the State's theory of when life begins upon the physician and his patient. J.S. at App. 40-41. Second, they intrude upon the medical discretion of the attending physician. J.S. at App. 41. Third, they act inequitably to protect women who are opposed to the use of abortifacients by requiring that women who prefer to use abortifacients be told that they are doing so. J.S. at App. 42. Finally, they infringe upon the woman's right of private decision-making in matters relevant to contraception. J.S. at App. 43. Each of these reasons is discussed below.

1. Sections 2(10) and 11(d) Do Not Make the Physician the Mouthpiece for the State's Theory of Life.

In striking §§ 2(10) and 11(d), the court held that they unconstitutionally "force[d] the physician to act as the mouthpiece for the State's theory of life." J.S. at App. 40. Citing *Akron* for the proposition that the State may not "foist[ ] upon the pregnant woman its view that life begins at conception," the Seventh Circuit reasoned that "sections 2(10) and 11(d) constitute such an attempt by the State of Illinois because the terms incorporate a definition of 'fetus' in which the State classifies a fetus as a human being from fertilization until death [*sic*]." *Id.* at 39-40.[10]

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[10] "Fetus" was formerly defined as a human being from fertilization until *birth*. Ill.Rev.Stat. ch. 38, ¶ 81-22(9) (1983). That definition of "fetus" was amended by House Bill 1399 prior to the court's ruling to mean "an individual organism of the species homo sapiens from fertilization to live birth." Ill.Rev.Stat. ch. 38, ¶ 81-22(6) (1984 Supp.). Thus, under the present law, the definition of fetus does not use the term "human being" or "human." Since the court seemingly did not base its decision on the presence or absence of the term "human" in the definition of fetus, that change is not relevant.

The language of *Akron* on which the court relied, however, is inapposite. That statement was made in the context of an ordinance that specifically required a doctor to tell a woman that "the unborn child is a human life from the moment of conception." *Akron*, 462 U.S. at 423 n.5. Nothing in either § 2(10), which is merely definitional, or § 11(d), the regulatory provision, requires the doctor to state any such thing. Indeed, in the court's own words, the plain language of § 11(d) "requires physicians who prescribe or administer abortifacients to inform their patients that they have done so." J.S. at App. 37. However, the court went beyond that language and proceeded to construe § 11(d) to require that physicians also inform their patients that "abortifacients cause the death of unborn children." J.S. at App. 42.

Certainly, had the General Assembly wished to foist a theory of life upon women and force physicians to act as a mouthpiece for that theory, it could have drafted § 11(d) to specifically require that the physician tell his patient that he is administering an abortifacient and that abortifacients "cause the death of unborn children." The General Assembly, however, did not do this. It merely required physicians to inform their patients when they are administering abortifacients to them. Section 11(d) does not restrict the physician's choice of words, nor does it mandate the use of any specific words. See this Brief at 12.

"Where fairly possible, courts should construe a statute to avoid the danger of unconstitutionality." *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 493 (1983). The Seventh Circuit's unwarranted construction of this provision clearly did not attempt to avoid the danger of unconstitutionality. Rather, the court read language, not enacted by the legislature, into § 11(d) for the express purpose of striking that provision down. *Ashcroft* teaches that such actions are entirely inappropriate.[11]

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[11] In addition, the court's construction was contrary to the construction given by appellants in both the district court and court of appeals. In those courts, appellants argued that to

(footnote continued on next page)

Since neither § 11(d) nor § 2(10) requires a physician to espouse a theory of life, it cannot be said that they foist such a theory of life on the physician's patient. Therefore, it was error for the court of appeals to strike these provisions as impermissibly foisting a theory of life upon the physician and his patient.

2. Physicians Do Not Have a Right, at Their Discretion, to Administer Abortifacients to Women Without Their Knowledge and Consent.

The second reason given by the court of appeals for striking §§ 2(10) and 11(d) was that they "intrude upon the medical discretion of the attending physician." J.S. at App. 41. Since the court does not delimit the right of doctors to exercise "medical discretion," or explain how these provisions infringe upon it, it may be assumed that the court felt that doctors somehow have an untrammelled right to exercise their discretion and that any requirement which relieves them of a portion of such discretion infringes upon that right.

It is clear, however, that physicians have no such independent right. They are not free to administer abortifacients without the knowledge and consent of their patients any more than they are free to perform an abortion upon a woman without her consent and against her will. *Danforth*, 428 U.S. at 67. *See* Part I A of this Brief.

(footnote continued from preceding page)

comply with § 11(d), doctors need only inform their patients that they are administering abortifacients and nothing more. State's Attorney Daley and Attorney General Hartigan are responsible for enforcement of these provisions. In both the district court and the court of appeals, they adopted the briefs of appellants as their own. *See* J.A. at 73-76, 135-138. This is a limiting construction by the State which the court of appeals was not free to ignore. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982).

Doctors have, on occasion, claimed that *Doe v. Bolton*, 410 U.S. 179 (1973), recognized a fundamental right "to practice medicine free of unwarranted state interference." *Whalen*, 429 U.S. at 604. However, such claims have been flatly rejected by the Court. Speaking for an unanimous Court, Justice Stevens stated:

> The constitutional right vindicated in *Doe* was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion provisions were invalid because *they encumbered the woman's exercise of that constitutionally protected right* by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution.

Id. (emphasis added). *See also Harris v. McRae*, 448 U.S. 297, 318 n.21 (1980).

Accordingly, in order for §§ 2(10) and 11(d) to be unconstitutional, they must place an obstacle in the path of the physician and that obstacle must, in turn, encumber the woman's right "to decide whether or not to bear a child." *Whalen*, 429 U.S. at 604. The only possible "obstacle" that § 11(d) imposes is that it requires a physician to inform his patient when he is giving her an abortifacient. However, the court of appeals does not explain how this "obstacle" can be said to "encumber" the woman's right to choose abortion. It never even addresses the question. Had it done so, it would have been compelled to find that these sections do not encumber the woman's right at all since it is impossible for a woman to choose an abortion when she does not know that one is being offered to her.

It is not surprising that no woman is before the Court challenging the operation of § 11(d). Only appellees, physicians and abortion clinics, are challenging it. These appellees claim to represent the interests of their patients. Yet, their claim must reduce to an argument that their female patients have a right to obtain abortions by using abortifacients in ignorance and that appellees have a derivative right to keep them in ignorance. This Court has never enunciated such a right and none exists. Thus, these sections cannot be held unconstitutional on this basis.

3. It Is Not Inequitable to Protect The Right of Women Who Are Opposed to the Use of Abortifacients By Requiring That All Women Be Informed When Abortifacients Are Prescribed for or Administered to Them.

The court of appeals suggested that §§ 2(10) and 11(d) are unconstitutional because it is inequitable to require that women wishing to use abortifacients be told that they are using them. J.S. at App. 42. The court fails to specify what supposed burden is imposed upon these women and no such burden is set forth in the record. A woman who is not opposed to abortion would not be burdened by being informed that an abortifacient has been prescribed for her. If, indeed, distress is caused to a woman from knowledge that an abortifacient has been prescribed for her, then it must be because she has reservations about abortion.

Sections 2(10) and 11(d) are designed to protect the fundamental rights of women who are opposed to abortion by allowing them to *choose* intelligently to refrain from using abortifacients. Thus, these provisions protect those women most likely to experience harm: those who unknowingly would accept abortifacients and later learn that what they thought was a contraceptive or other medication was, in fact, an article violating their most deeply held beliefs.

The only possible burden imposed by § 11(d) would be to women who would like to use abortifacients but would prefer to do so in ignorance. Such an interest in using abortifacients in ignorance is neither fundamental nor sufficient to strike this statute. The fundamental right of women who are opposed to abortion to choose not to use abortifacients must be given greater protection. The inequity of the situation is not, as the court below suggested, in protecting the fundamental rights of women opposed to abortion. Rather, the inequity lies in the court's holding. That holding requires the State to subordinate its compelling interest in protecting the fundamental right of choice to the right of some women to remain ignorant. The court of appeals should not have invalidated §§ 2(10) and 11(d) in order to protect such a speculative and spurious interest.

4. Sections 2(10) and 11(d) Do Not Infringe Upon the Woman's Right of Private Decision-Making in Matters Relevant to Contraception.

The Seventh Circuit's final reason for striking these sections was that they infringed upon the woman's right to use contraception. J.S. at App. 43. This statement, alone, demonstrates the failure of the court to grasp the fundamental difference between contraceptives and abortifacients. Section 11(d) applies only when an *abortifacient* (not a contraceptive) is being prescribed.

The only conceivable way that this section could infringe upon a woman's right to use contraceptives would be if the State were to classify certain contraceptives as abortifacients in an attempt to dissuade women from using those contraceptives. This the State has not done. Contraception refers to the "artificial prevention of the fertilization of the human ovum." *Webster's New Twentieth Century Dictionary Unabridged* 396 (2d ed. 1983). In contrast, abortifacients, because they cause abortions, do not prevent fertilization. Rather, they prevent birth after fertilization has taken place.

Section 2(10) does not define abortifacient in a manner that would include methods of contraception. It applies only to drugs that prevent birth after fertilization has taken place. Only those drugs which the physician knows are abortifacients and are *in fact* abortifacients are covered by § 11(d). Therefore, it would be impossible for this section to infringe upon a woman's right to use contraceptives. Since these sections do not even apply to contraception, they cannot be held unconstitutional on this last ground.

II. A JUSTICIABLE CASE OR CONTROVERSY DID NOT EXIST WITH RESPECT TO UNAMENDED SECTIONS 6(1) AND 6(4) IN THE COURT OF APPEALS

On June 30, 1984, after the issues were fully briefed in the court of appeals but before oral argument, the General Assembly enacted H.B. 1399. That bill amended a number of provisions of the Illinois Abortion Law, including §§ 6(1) and 6(4). *See* Appendix to this Brief (App.) at 5a-7a.

A. A Live Case or Controversy Remains With Respect to Amended §§ 6(1) and 6(4).

An amendment to a challenged law during the pendency of litigation raises questions of mootness. *Schall v. Martin*, 104 S.Ct. 2403, 2405 n.2 (1984). "In the federal system an appellate court determines mootness as of the time it was filed." *Allee v. Medrano*, 416 U.S. 802, 818 n.12 (1974). Consequently, it is well-settled that federal appellate courts "must review [lower court holdings] in light of presently existing [ ] law, not the law in effect at the time that judgment was rendered." *Fusari v. Steinberg*, 419 U.S. 379, 387 (1975).

A change in law that so substantially alters the law as to eliminate the questions under review moots those questions.[12] In *Allee*, an amendment to a statute which was challenged on vagueness grounds substantially altered the vagueness issue

[12] The proper course of action for the reviewing court in such circumstances is to vacate the lower court judgment with directions to dismiss the complaint as moot. *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950).

since the amended language was narrower than its predecessor. 416 U.S. at 818. In such a case, "if there are no pending prosecutions under the old statutes, the portion of the [lower court's] judgment relating to them [is] moot." *Id.*

A change in law that does not moot all of the issues on appeal requires the reviewing court to resolve those questions which are not moot. *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Pacific Mail Steamship Co. v. Joliffe*, 69 U.S. 450 (1864). However, should the reviewing court find that additional facts are necessary in order to review the amended law, it may vacate the lower court's judgment and "remand for reconsideration in light of the intervening changes in [the] law." *Fusari*, 419 U.S. at 390.

The Court's decisions in *Brockington v. Rhodes*, 396 U.S. 41 (1969), and *Hall v. Beals*, 396 U.S. 45 (1969), illustrate the governing principles for determining whether a live case or controversy exists with respect to an amended law. In *Brockington*, an Ohio statute that required the signatures of 7% of the voters before a name could be placed on the election ballot was challenged by a prospective candidate who had obtained only 1% of the voters' signatures. While the appeal was pending before the Court, the relevant statute was amended, reducing the signature requirement to 4%. In response to a suggestion of mootness, the Court stated:

> We do not think the recent statutory amendment has rendered this case moot. For the appellant has consistently urged the unconstitutionality of any percentage requirement in excess of the 1% that Ohio imposed prior to 1952, and he obtained the signatures of only about 1% of the voters in his district. He thus could not have won a place on the ballot even under the statute as currently written.

Brockington, 396 U.S. at 43.

In contrast, in *Hall v. Beals*, a Colorado law requiring six months residency prior to voting in a presidential election

was challenged by a class of persons who had resided in Colorado for only five months and wished to vote in the election. After probable jurisdiction had been noted, the law was amended to require only two months in-state residency.

Reviewing "the judgment below in light of the Colorado statute as it now stands, not as it once did," *Hall*, 396 U.S. at 48 (citations omitted), the Court held that the case was moot since "under the statute as currently written, the appellants could have voted in the 1968 presidential election." *Id.* Even though appellants also opposed the two month residency requirement, the court stated: "[A]ppellants' opposition to residency requirements in general cannot alter the fact that so far as they are concerned nothing in the Colorado legislative scheme as now written adversely affects either their present interests, or their interests at the time this litigation was commenced." *Id.* at 48-49.

In applying the above principles to amended § 6(1), it is not entirely clear whether a case or controversy continues to exist. Whether appellees' challenge of § 6(1) has been mooted entirely depends upon whether appellees, in their challenge of prior § 6(1), questioned the State's ability to regulate abortion on behalf of fetal life after viability, or whether they based their challenge solely on vagueness grounds. If the former, a live case or controversy remains with respect to amended § 6(1) because appellants clearly argue that the State has a right to regulate in that manner.

Application of *Brockington* and *Hall* to § 6(4) indicates that a live case or controversy remains with respect to amended § 6(4). As in *Brockington*, appellees continue to urge the unconstitutionality of the amended provision and appellants continue to claim that it is constitutional. Appellees allege that HB 1399 only "superficially" amended § 6(4) and that the new language "retains the very standard held unconstitutional by both the Court of Appeals and the District

Court." [13] Motion to Dismiss or Affirm (Motion) at 8. In short, appellees maintain that the amended version of § 6(4) contains the same constitutional deficiencies as its predecessor.[14]

The existence of a live case or controversy with respect to the amended law does not, however, mean that the court of appeals was at liberty to review §§ 6(1) and 6(4) as they stood unamended. If the court intended to render an opinion affecting the rights of the litigants, it ought to have decided the constitutionality of those sections as they stood amended.

This Court has jurisdiction to review the amended provisions and should do so. They present questions of law, not fact, and there is no need to remand so that the record can be expanded. Neither justice nor judicial economy would be served by remanding this case. The State of Illinois has already had its legitimate attempts to regulate in this area frustrated by injunction since 1979. A remand would only result in further delay with the same legal issues coming before this Court at a later date.

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[13] Apparently, appellees do not understand the term "standard of care" used in old § 6(4) to be different from the term "method of abortion" used in the amended version. It is assumed that they base their statements on the fact that those terms were equated by the court in *Wynn v. Scott*, 449 F.Supp. 1302 (N.D.Ill. 1978), *aff'd sub nom. Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979).

[14] In their Motion to Dismiss or Affirm appellees state that:

> [the] new section 6(4) continues to impose criminal liability on physicians who fail to act on behalf of a pre-viable fetus with only a "possibility of survival" outside the womb. Section 6(4) thus continues to contravene the prior holdings of this Court barring regulation of previability abortions unless that regulation is narrowly structured to protect maternal health.

Motion at 10-11.

B. The Court of Appeals Erred in Reviewing Unamended §§ 6(1) and 6(4).

In spite of the amendments to these provisions and the mootness holdings of this Court, the court of appeals held that the old sections were not moot. In so holding, it applied the "voluntary abandonment" exception to mootness.

While it is true that voluntary cessation of allegedly illegal conduct will not, standing alone, dispel a controversy, it will have this effect if "(1) it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citation omitted).

There is no reasonable expectation that the alleged violation will recur because it is unreasonable to suggest that the General Assembly would ever re-enact the old provisions which it recently amended. The amendment of these sections did not constitute an abandonment by the State of any regulation of abortion. Rather, it consisted entirely of "fine-tuning" which left fully intact the substantive protection of the life and health of the fetus which were afforded by unamended §§ 6(1) and 6(4). Under both the old sections and the new, the General Assembly sought to maximize the chances of fetal survival after abortion. It did not simply repeal certain language in anticipation of litigation in an attempt to moot a consitutional challenge, and then re-enact the same language at a later date. *Cf. City of Mesquite v. Aladdin's Castle,* 455 U.S. 283, 289 (1982).[15]

As the court of appeals acknowledged, "the State has attempted repeatedly to alter the contours of [the Illinois Abortion Law] to reflect the latest judicial pronouncements

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[15] It should be noted that the amendment to § 6(1) followed a favorable decision in the district court. Thus, it can hardly be claimed that the State was attempting to avoid an unfavorable ruling by the courts.

in the area of abortion and privacy." J.S. at App. 20. Far from indicating malice, such actions indicate only a good faith attempt by the legislature to conform its laws to the holdings of this Court.[16] The General Assembly, in the context of abortion regulation, has never repealed a challenged provision and subsequently re-enacted that same provision at a later date. Thus, *Mesquite* is inapplicable. In *Mesquite*, the city had a history of repealing its laws and later reenacting them. 455 U.S. at 289. In addition, it openly acknowledged that it intended to re-enact the challenged provision in that case. *Id.* at 289 n.11.

Furthermore, the General Assembly clearly has no intention to re-enact unamended §§ 6(1) and 6(4) since the amendments to those sections were made, in large part, because of the addition of new § 6(2) providing for a second physician to be present during post-viable abortions. *See* App. at 6a. The language of that new section tracks the language of the Missouri statute that was upheld in *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 479 n.3 (1983). The language of unamended §§6(1) and 6(4) is inconsistent with § 6(2). It is ludicrous to suggest, as appellees do, that the State of Illinois would perform the arduous task of enacting a provision over gubernatorial veto with the intent of later re-enacting its prior provisions.[17] Common sense requires that such a scenario be rejected.

Moreover, appellees have offered no evidence that would support such a conclusion. Thus, there is no reasonable expectation that the State will reenact unamended §§6(1) or 6(4).

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[16] H.B. 1399 was enacted after this Court's holdings in *Akron* and *Ashcroft* in 1983.

[17] Unlike the municipal ordinance in *Mesquite*, a state statute is far more difficult to enact. This is especially so in the sensitive area of abortion where, as here, a 3/5 majority vote was necessary to override the gubernatorial veto of H.B. 1399.

Finally, since appellees' challenge to these sections was purely facial, amendment of those provisions necessarily has cured whatever "chilling" effect the unamended provisions may have had upon appellees.[18] *See Allee*, 416 U.S. at 818.

This Court, in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), recently held that, in order to meet the case or controversy requirement of Article III of the U.S. Constitution,

> [t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real' and 'immediate,' not 'conjectural' or 'hypothetical.'

Lyons, 461 U.S. at 101-102 (citations omitted).

There has been no showing, indeed appellees cannot show, that unamended §§ 6(1) and 6(4) have a continued "chilling effect" on their ability, presently or in the future, to perform late term abortions. Late term abortions performed now or in the future are governed by the amended provisions.

No person has ever been prosecuted under prior § 6(1) and no prosecutions are now pending. Nor is there evidence that any abortions were performed on a viable fetus during the time when that section was enforceable in a manner inconsistent with its dictates. The purely theoretical possibility of prosecutions for violations of § 6(1) in its prior form which might have occurred during the few months that that provision was enforceable, is not sufficient to establish a case or controversy. Thus, the court of appeals erred in addressing unamended §§ 6(1) and 6(4).

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[18] Whatever "chilling effect" the unamended provisions may have had on abortions performed during the months when those provisions were in effect, they do not now have a chilling effect since they are no longer on the statute books.

III. THE UNAMENDED VERSION OF SECTION 6(1) IS CONSTITUTIONAL BECAUSE IT IS REASONABLY DRAWN TO PRESERVE THE COMPELLING STATE INTEREST IN PROTECTING VIABLE UNBORN LIFE, AND PLACES NO OBSTACLE IN THE PATH OF A WOMAN EXERCISING HER RIGHT TO TERMINATE A PREGNANCY

A. The State Interest in Protecting Fetal Life Subsequent to Viability Is Compelling and Permits Regulation of Methods of Abortion in Order to Enhance the Likelihood of Fetal Survival Where Such Regulations Do Not Increase Any Risk to the Woman

Section 6(1)[19] of the Illinois law presents this issue for resolution: whether, in the exercise of its compelling interest in the life of the viable fetus, the State of Illinois may regulate abortions performed after viability by requiring employment of a standard of care to protect the life of the fetus.[20]

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[19] Unamended § 6(1) states:

> No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a viable fetus or infant results from such a failure.

Ill.Rev.Stat. ch. 38, ¶ 81-26(1) (1983).

[20] Section 6(1) does not require the employment of any measure to encourage or sustain the life of the fetus "which, in the medical judgment of the physician performing the abortion based on the particular facts of the case before him, would increase medical risk to the mother." Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1983).

Such regulation of abortion is constitutional given the compelling state interest in fetal life at viability. "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, or even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe v. Wade*, 410 U.S. 113, 164-165 (1973); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 482 (1983). Regulation of abortion after viability is valid if it "reasonably furthers the State's compelling interest in protecting the lives of viable fetuses. . . ." *Ashcroft*, 462 U.S. at 486. Furthermore, such legislation "need not accommodate every conceivable contingency." *Id.* at 485 n.7.

In *Ashcroft*, this Court upheld a provision that required the attendance of a second physician during the abortion of a viable fetus. Noting that the second physician will be able to assure that the interest in preserving life is more fully served than the physician performing the abortion alone would be able to do, this Court concluded that the Missouri provision "reasonably furthers the State's compelling interest in protecting the lives of viable fetuses." *Id.* at 486.

The provisions at issue here, prescribing a standard of care toward viable fetuses, are no more burdensome than Missouri's second-physician requirement. The Missouri second-physician provision requires that certain measures be taken to preserve the life of any child which survives an abortion performed after viability. Section 6(1) requires that fetal protection measures be taken during the course of the abortion performed after viability. In both instances, the State is regulating when it has a compelling interest to do so and in a manner that does not impermissibly burden the woman.

Furthermore, two courts of appeals, *including* the Seventh Circuit, have upheld provisions similar to § 6(1).

In *Planned Parenthood v. Ashcroft*, 655 F.2d 848, 863-864 (8th Cir. 1981) *aff'd in part and rev'd in part on other grounds*, 462 U.S. 476 (1983), the Eighth Circuit found no constitutional

infirmity in Missouri's requirement of the use of "fetal survival methods" of abortion after viability. 655 F.2d at 863.

> This is clearly within the State's power, as long as it does not interfere with medical judgment as to the method necessary for the preservation of the life or health of the mother. . . . Thus, the Missouri statute is clearly constitutional in requiring use of a fetal survival method when the risks of that method to the woman are lower than alternatives. The only remaining question is whether the State can constitutionally require the use of the fetal survival method where the risk is equal. By definition, if the risk is absolutely equal, the life and health of the mother are subjected to no greater risk by requiring use of the fetal survival method. By requiring use of the fetal survival method when the risks from it are less than or equal to the risk of alternatives, Missouri is within permissible bounds of regulation.

655 F.2d at 863 (citations and footnotes omitted). In addition, the Seventh Circuit *previously* upheld a standard of care virtually identical to the one at issue here. *Wynn v. Scott*, 449 F.Supp. 1302, 1321 (N.D.Ill. 1978) (three-judge court), *aff'd sub nom., Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979). Thus, state regulation of the manner of performing an abortion after viability is a valid exercise of the state interest in protecting fetal life.

B. The Court of Appeals Erred in Holding § 6(1) to Be Unconstitutional on Grounds of Vagueness and Chilling Effect

The court of appeals "[did] not hold that the State may never prescribe standards of care to physicians, or their assistants, who perform abortions on a fetus which has attained viability." J.S. at App. 28. Nevertheless, the court held the unamended version of § 6(1) unconstitutional. The court found § 6(1) to be vague for two reasons: 1) it failed to "specify that the attending physician's viability determina-

tion alone shall govern," J.S. at App. 28 and 2) it "imprecisely informs physicians and their assistants as to what conduct by them the State prohibits." J.S. at App. 31. The court then held that the vagueness of § 6(1) threatened to chill the exercise of the physician's best medical judgment and thereby chill the exercise of the woman's fundamental right to consult her doctor about abortion and to receive her doctor's unimpeded medical judgment.

In reaching these conclusions, the court of appeals misapplied basic constitutional doctrines pertaining to vagueness. As a three-judge federal panel wrote in upholding a prior version of § 6(1), "[a] statute is not unconstitutional because someone does not understand it." *Wynn v. Scott*, 449 F.Supp. at 1316. To be void for vagueness, "[a] criminal statute [must] 'fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute' or [be] so indefinite that 'it encourages arbitrary and erratic arrests and convictions.'" *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (citations omitted). No such danger is presented by § 6(1).

1. Under § 6(1), the Viability Determination of the Physician Performing the Abortion Is Determinative

Despite plain statutory language that only *intentional* failure to provide the requisite standard of care on a fetus *known* to be viable is subject to prosecution, the court of appeals speculated that the term "known to be viable" may not be limited to the knowledge of the physician who is performing the abortion. "Section 6(1) does not specify . . . which party, physician or assistant, must make this viability determination. . . . In addition, the section could make criminal a physician's failure to observe the required standard of care in situations where some other physician, but not the treating physician, believes that the fetus is viable." J.S. at App. 26.

Other provisions in the Illinois Abortion Law reveal that this construction is untenable. Section 2(2), as amended in 1983, defines "viability" as follows:[21]

> [T]hat stage of fetal development when, *in the medical judgment of the attending physician based on the particular facts of the case before him,* there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.

Ill.Rev.Stat., ch. 38, ¶ 81-22(2) (1983) (emphasis supplied).

In light of § 2(2), the only reasonable construction of the phrase "known to be viable" is that it refers to a determination by the attending physician that the fetus is capable of sustained survival outside of the womb.

Prosecution of the attending physician under § 6(1) would require that he or she made the judgment of viability before the abortion was performed but nevertheless intentionally failed to comply with the standard of care requirements of § 6(1). Prosecution of one assisting the attending physician would require that he or she knew that the attending physician had made a determination of viability before the abortion was performed, and that he or she nevertheless intentionally failed to comply with the standard of care requirements of § 6(1). The only determination of viability that has any application under § 6(1) is the determination made by the attending physician prior to the performance of the abortion. A good faith judgment of nonviability will not be second-guessed by the State. *Cf. Ashcroft*, 655 F.2d at 863-864. However, if a physician has made a judgment that the fetus is viable, the State may prohibit the use of an "abortion method [which] is not necessary for the life or health of the woman." *Id.* at 864.

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[21] The preamble to the definitions in Section 2 of the Abortion Law states that "[u]nless the language or context *clearly indicates* a different meaning is intended, the following words or phrases for the purpose of this Law shall be given the meaning ascribed to them." (Emphasis supplied).

In its opinion the court of appeals stated that a determination of viability by "others," meaning non-physicians "who assist physicians in the performance of abortions on a viable fetus," J.S. at App. 25, may bring § 6(1) into operation. The court then reasoned that § 6(1) is unconstitutional because it "could make criminal an *assistant's* failure to use the requisite standard of care *in aborting a fetus* which the assistant *but not the physician* believes is nonviable." J.S. at App. 26 (emphasis supplied). This holding demonstrates the confusion in the analysis of the court of appeals. First, only a physician can legally perform an abortion in Illinois. Ill.Rev.Stat. ch. 38, ¶ 81-23.1 (1983); *see also Connecticut v. Menillo*, 423 U.S. 9 (1975). Second, as previously established, only a physician in the exercise of his medical judgment can make a determination of viability. Ill.Rev.Stat. ch. 38, ¶ 81-22(2). To construe § 6(1) otherwise is to ignore explicit language in the remainder of the Illinois law, and to defy common sense.

As this Court held in *Ashcroft*, "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." 462 U.S. at 493. In this case, the court of appeals did precisely the opposite. The Court ignored a controlling statutory provision, and then proceeded to give a twisted reading to a straightforward criminal provision, which provision requires both prior knowledge and specific intent before criminal liability could attach. The court thus plainly erred in holding that § 6(1) does not specify that the determination of viability of the attending physician shall govern its operation.

2. The Standard of Care Required by § 6(1) Is Not Vague.

The court also erred in holding that § 6(1) fails to give adequate notice of the conduct that it requires of physicians and their assistants. The standard of care imposed by § 6(1) is not difficult to understand or apply. Physicians apply the standard of care applicable to their particular specialty and geographical location day in and day out in their practice.

In *United States v. Vuitch*, 402 U.S. 62 (1971), this Court rejected a vagueness challenge to a statute which prohibited abortions except where necessary to preserve maternal life or health. Ruling that the term "health" did not render the statute unconstitutionally vague, this Court stated "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." *Id.* at 72. Thus, a regulation of abortion is not void, as the court of appeals suggests, because it fails to state the "precise" responsibilities of physicians. J.S. at App. 31. It is permissible for States to set forth a general standard of care and require physicians to exercise their medical judgment in deciding how best to abide by that standard.

Indeed, a three-judge panel upheld an earlier version of the Illinois law, prescribing a nearly identical standard of care, as follows:

> [The statute] does not require that the physician increase the risk to the woman in order to save the fetus. If, however, there are instances where a physician has a choice of procedures, both of equal risk to the woman, the physician must choose the procedure which is least likely to kill the fetus.

Wynn v. Scott, 449 F.Supp. at 1321.

Section 6(1), as it must, leaves the choice of procedures and measures to be taken in any particular case to the medical judgment of the attending physician. It penalizes only an *intentional* failure, to make use of available measures to preserve fetal life or health, provided such measures would pose no increased risk to maternal life or health.[22]

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[22] In striking § 6(1) on grounds of vagueness, the court of appeals adopted a standard of review that is far more hostile to state regulation of abortion after viability than any which has been adopted by this Court:

> In addition, the State must *precisely* tailor its standards of care to the particular State interest at stake so that its statute *precisely* notifies physicians and their assistants as

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3. Since § 6(1) Is Not Vague and the State Interest in Protecting Fetal Life After Viability Is Compelling, § 6(1) Has No Impermissible "Chilling Effect" Upon Any Constitutional Right.

Finally, the court of appeals erred in holding that § 6(1) has a chilling effect upon the right to abortion because it "abuts upon" the exercise of this right and prevents the woman's access to the physician's advice and unimpeded medical judgment. This holding is wrong on several counts. First, § 6(1), standing alone, places no obstacle in the path of a woman seeking an abortion. She is free to consult with her physician and obtain an abortion based on his best medical judgment. It merely regulates the manner in which the physician may perform a post-viable abortion. Thus, § 6(1) does not unconstitutionally "chill" the procurement of an abortion.

Second, any impact which § 6(1) has upon the consultation between a woman and her physician is plainly justified by the compelling state interest in the life of the viable fetus she is carrying. To say that this section "abuts upon" the ability to obtain an abortion is to ignore the fact that the State is empowered by its compelling interest in the fetus to prohibit abortion altogether after viability, except where necessary in medical judgment to preserve maternal life or health. *Roe*, 410 U.S. at 164-165. Clearly, if the State can

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> to what conduct by them the State purports to condemn. Section 6(1) fails to give physicians and their assistants such *explicit* notice.

J.S. at App. 29 (emphasis supplied). In *Ashcroft*, this Court indicated that a statute which operates after viability is constitutional if it "reasonably furthers the State's compelling interest." 462 U.S. at 486. Satisfaction of the standard proposed by the court of appeals would effectively require the State to legislate the parameters of medical judgment, contrary to the opinions of this Court which require deference to the physician's medical judgment and the standards of accepted medical practice. *Akron*, 462 U.S. at 431.

prohibit such abortions, it may take the less restrictive measure of restricting harmful activity directed at the fetus during the course of those abortions that are performed after viability.

Third, the bare existence of a criminal penalty does not produce an impermissible chilling effect. Many forms of regulation of abortion impose some form of criminal liability. This fact, in and of itself, does not constitute an unconstitutional burden on the right to abortion. *Menillo*, 423 U.S. at 10 (1975). Indeed, to suggest that a regulation of abortion impermissibly "chills" the exercise of a constitutional right merely because criminal sanctions attach if it is violated would obliterate the ability of the State to regulate on behalf of maternal health and fetal life and require that most of this Court's prior abortion decisions be overruled. Accordingly, the court of appeals was in error when it invalidated § 6(1) on grounds of vagueness.

IV. SINCE UNAMENDED SECTION 6(4) PLACES NO BURDEN UPON A WOMAN SEEKING TO OBTAIN AN ABORTION AND IS SUPPORTED BY A COMPELLING OR, AT LEAST, VERY SUBSTANTIAL STATE INTEREST IN THE PROTECTION OF FETAL LIFE, IT IS CONSTITUTIONAL

The State has a legitimate interest in protecting fetal life throughout pregnancy which grows in substantiality as the pregnancy advances. *Roe v. Wade*, 410 U.S. 113, 163-164 (1973). The State of Illinois has sought to further its interest in fetal life by regulating the method by which an abortion may be performed in order to maximize the chances of fetal survival. To this end, § 6(4)[23] requires that the method of

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[23] Unamended §6(4) states:

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life or health of the fetus which such person would be required to exercise in

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abortion most likely to preserve the life and health of the fetus be used when, in the physician's judgment, there is a possibility of fetal survival. Section 6(4) does not apply when the fetal survival method of abortion would increase risk to the mother. Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1983), App. at 4a. Thus, the State has sought to further its interest in protecting the fetus without infringing upon the woman's right to terminate her pregnancy in any way.

The court of appeals invalidated § 6(4) for two reasons: 1) it places a burden on the woman's right to abortion by placing the possibility of criminal sanctions against her physician, and 2) it applies to certain previability abortions, and is not supported by a compelling state interest. The court of appeals erred on both counts.

A. Section 6(4) Does Not Burden the Woman's Right to Terminate Pregnancy

Section 6(4) regulates abortion when there is a *possibility* known to the physician performing the abortion of sustained survival of the fetus apart from the body of the mother with or without artificial support. In such situations, the physician and those assisting him must employ the same degree of professional skill, care and diligence to preserve the life and health of the fetus to be aborted as they would be

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> order to preserve the life and health of any fetus intended to be born and not aborted when there exists in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him a possibility known to him of sustained survival of the fetus apart from the body of the mother with or without artificial support. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus before or after birth is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure.

Ill.Rev.Stat. ch. 38, ¶81-26(4) (1983).

required to exercise toward a fetus intended to be born and not aborted. This standard of care has been construed to mean that the physician must choose the method of abortion most likely to cause fetal survival. *See Wynn v. Scott,* 449 F.Supp. 1302, 1321 (N.D.Ill. 1978), *aff'd sub nom. Wynn v. Carey,* 599 F.2d 193 (7th Cir. 1979).

Section 6(4) does not, therefore, restrict in any way the ability of a woman to obtain an abortion. It merely regulates the manner in which a physician may perform an abortion once he knows that there is a possibility of sustained survival for the fetus without increasing risk to the mother.

The various methods of abortion cause greater or lesser complications for the fetus. Dilatation and evacuation, which entails dismemberment of the fetus, ensures fetal death. *Planned Parenthood v. Ashcroft,* 462 U.S. 476, 483 n.7 (1983). A fetus may, however, survive a saline or prostaglandin abortion and the medical literature shows that prostaglandin abortions have a greater incidence of live birth. *See, e.g.*, Stroh & Hinman, *Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience In Upstate New York,* 126 Am.J.Obstet. & Gynecol. 83 (1976). Moreover, in order to prevent the "complication" of live birth following abortion, new technologies have been developed which are designed solely to ensure the death of the fetus. For example, toxic compounds such as urea are administered prior to the performance of an instillation abortion to ensure fetal death and avoid live birth.[24] This is in spite of the fact that such drugs may increase risk to the mother's physical health.[25]

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[24] *See, e.g.*, Haning & Peckham, *Evaluation of Intra-amniotic Adminstration of 120 gm of Urea with 5 mg of Prostaglandin F2 alpha for Midtrimester Termination of Pregnancy between 20 and 24 Weeks' Gestation,* 151 Am.J.Obstet. & Gynecol. 92 (1985); Grimes, *Second-Trimester Abortions in the United States,* 16 Family Planning Perspectives 260, 265 (1984).

[25] *See, e.g.*, Kajanoja, *Induction of Abortion By Prostaglandins in the Second Trimester of Pregnancy,* 113 Acta Obstet.Gynecol.

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Section 6(4) is intended only to restrict such hostile activity toward the fetus. In no circumstances is § 6(4) an obstacle to the decision of whether or not to terminate the pregnancy. The woman remains free to consult with her physician and decide to terminate her pregnancy for whatever reason she and her physician decide upon. She also remains free to effectuate the decision by legally terminating her pregnancy. Section 6(4) only restricts the manner in which the termination of pregnancy—emptying of the womb—can take place since it requires that the physician exercise his medical judgment with the same degree of professional skill, care and diligence to preserve the life or health of the fetus where this can be done without increasing *any risk* to the woman.

Despite these facts, the court of appeals held that § 6(4) imposes a burden upon a woman seeking an abortion because there is a "possibility that the woman will be unable to exercise her privacy right because her doctor refuses to perform an abortion at the risk of inducing criminal sanction." J.S. at App. 34. This analysis avoids the question that is crucial to a sound constitutional analysis of § 6(4). That question is whether the woman has a constitutional right to terminate her pregnancy in a manner that ensures fetal death when other methods that will not increase risk to her and will offer a greater chance of fetal survival are available. If she does not have such a right, then she has no constitutionally protected right to *obtain* an abortion by a method that will ensure fetal death. Her inability to obtain such an abortion could not be said to violate any constitutional right.

To hold otherwise would be contrary to common sense and the holdings of this Court. For example, under the court of appeals' analysis, it would be impermissible for a State to require that all abortions be performed by a physician since the refusal of doctors, in certain areas of the country, to

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Scandinavica Supp. 145, 148 (1983) (simultaneous injection of PGF2 alpha and urea causes more frequent side effects than when PGF2 alpha is given alone).

perform any abortions would limit the woman's access to abortion and would place an unconstitutional burden on the woman's right to terminate her pregnancy.

Such analysis was explicitly rejected by the Court in *Connecticut v. Menillo*, 423 U.S. 9, 10 (1975). In *Menillo*, the Court first determined that a woman does not have a constitutional right to obtain an abortion in an unsafe manner. Since she has no constitutional right to obtain an abortion by a nonphysician, the Court held that a state statute requiring that all abortions be performed by physicians did not violate the woman's right to terminate her pregnancy. *Id.*

The abortional right, as recognized by this Court, is a right to decide whether or not to terminate pregnancy (to expel the fetus from the womb) and to safely effectuate the decision. *Roe*, 410 U.S. at 153, *Menillo*, 423 U.S. at 10 (1975).

The right does not include a right to actively seek to kill the fetus when there is a possibility that the fetus is capable of sustained survival outside the womb. No court has ever held that the right secured in *Roe* is so expansive. In fact, such a notion has been specifically rejected. In *Wynn v. Scott*, the court noted:

> If [ ] there are instances where a physician has a choice of procedures, both of equal risk to the woman, the physician must choose the procedure which is least likely to kill the fetus. This choice would not interfere with the woman's right to terminate her pregnancy. *It never could be argued that she has a constitutionally protected right to kill the fetus. She does not.*

Wynn v. Scott, 449 F.Supp. at 1321 (emphasis added). Since a woman does not have a constitutional right to terminate a pregnancy in a manner that will ensure fetal death, a state statute requiring that the method of abortion used be one that is safer for an unborn child, does not violate the woman's right to terminate her pregnancy.

Moreover, sound constitutional adjudication requires close attention to what consequences flow from "state action" and what consequences flow from unrelated private decisions and conduct. *Maher v. Roe*, 432 U.S. 464, 474 (1977). The former may be conceived as "burdens" on the right to abort, while the latter lack constitutional significance. *Harris v. McRae*, 448 U.S. 297, 315 (1980). Particularly close attention to this distinction is warranted in the present context since appellees claim that the private refusal of doctors to provide abortions when a statute such as §6(4) is in place imposes an unconstitutional burden on a women's right to terminate her pregnancy by limiting her access to abortions.

The requirements of §6(4) neither coerce nor significantly encourage any physician to refuse to perform abortions by the method most likely to result in fetal survival. Thus, the private decisions of some physicians to refuse to perform all abortions when there is a reasonable possibility of fetal survival, simply because they are unable to perform them by a method that would ensure fetal death, cannot be attributed to the State.

For the foregoing reasons, § 6(4) does not burden a woman's right to obtain a safe, legal abortion. Thus, the court of appeals erred in holding that § 6(4) does create such a burden.

B. The State Interest in Protecting Fetal Life Is Compelling, or at Least Very Substantial, Whenever There Is a Possibility of Sustained Survival of the Fetus Outside of the Womb

1. The State's Interest in the Fetus Is Compelling When the Fetus Is Potentially Able to Survive Outside the Womb

This Court has consistently held that the State has a compelling interest in protecting the lives of unborn children who are capable of sustained survival outside of the womb. In *Roe*, the Court held that the State's interest in the fetus becomes compelling when the fetus is "potentially able to

live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160. *See also Planned Parenthood v. Danforth*, 428 U.S. 52, 63 (1976). That holding was reaffirmed in *Colautti v. Franklin*, 439 U.S. 379, 393 n.11 (1979).[26]

Section 6(4) does not prohibit abortions. It merely protects fetuses who have the potential to live outside the womb from gratuitous hostile activity during the course of an abortion that is unrelated to the process of "emptying the womb." Illinois has legitimately chosen to enforce this provision at the earliest point in pregnancy at which this Court has recognized a compelling state interest in fetal life. The *Roe* definition of viability clearly encompasses situations where the physician knows, based on the facts of the case before him, that there is a possibility of sustained survival.[27]

Since § 6(4) applies only when there is a possibility that the fetus can survive, under *Roe* it operates at a time when the State's interest is compelling.

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[26] In *Colautti*, this Court eschewed the contention that the earlier definitions of viability set forth in *Roe* and *Danforth* had been rejected:

> [T]here is no merit in the dissenting opinion's suggestion [] that the Court has "tacitly disown[ed]" the definition of viability as set forth in *Roe* and *Planned Parenthood*. On the contrary, as noted above [] we *reaffirm* what was said in those decisions about this critical concept.

439 U.S. at 393 n.11 (emphasis in original).

[27] "Potential" is defined as "existing in possibility" in *Webster's New Collegiate Dictionary* 660 (1956), and as "possible" in *The American Heritage Dictionary of the English Language* 1025 (1975). Thus in common usage, "potentially able to live" as used in *Roe* means the same thing as "possibly able to live."

2. Even if the State Interest in Protecting Fetal Life When There Is a Possibility of Sustained Survival of the Fetus Is Not Deemed Compelling, It Is Nevertheless Very Substantial and, Therefore, Sufficient to Uphold a Regulation, Such as § 6(4), That Imposes No Burden Upon a Woman's Right to an Abortion.

The court of appeals held that § 6(4) regulates "the abortion of a fetus which is potentially viable," J.S. at App. 32-33, and thus, regulates "the performance of abortions at a stage prior to viability." *Id.* at 33. Holding that the interest in protecting fetal life becomes compelling only at viability, and that the State's interest was not compelling here, the court struck § 6(4). The implication of the court's holding is that the State's interest in the fetus is non-existent prior to "viability" and suddenly becomes compelling at that point. That analysis, however, is seriously flawed. The state interest in protecting fetal life grows in substantiality during the course of pregnancy and becomes compelling at the point of viability. *Roe*, 410 U.S. at 164-165. Assuming, *arguendo*, that the state interest concerning § 6(4) is not compelling, it is certainly very substantial whenever there is a possibility of sustained survival for the fetus outside of the womb. *Id.*

Section 6(4) does not burden the woman's decision to abort. It merely requires that the physician give attention to the life and health of any fetus which he thinks has a possibility of surviving. The State does not question the physician's good faith judgment, but it does require that, in light of this judgment, the physician account for the possibility of sustained fetal survival.

This exercise of the State's important interest in protecting fetal life is particularly appropriate because of the advances in neonatal medicine that have brought the point at which a fetus is potentially able to survive outside the womb within the second trimester of pregnancy. *See* Charts of premature infant survivability, App. at 8a-9a. An examination of these charts shows the actual complexity of the medical judgment of viability. In the more recent studies 50% of the fetuses of gestational age of 24 weeks survived. By 26 weeks survival increased to 67% and by 30 weeks to 95%. The possibility of

sustained survival is directly related to advancing gestational age and to birthweight. The more advanced gestational age, the greater the probability of survival.

Under this Court's decisions the State has a compelling interest in protecting any individual fetus for whom the physician has made the determination that sustained survival is possible. It is presumed that the physician's medical judgment is not made in a vacuum but will be based on medical studies which show some possibility of survival in the class in which a particular fetus falls. The fact that *some* members of that class will not survive does not mean that, by providing protection for an *individual* fetus, one has sought to assert a compelling interest *prior* to viability. Those fetuses who survive and who fall in the earliest gestational stages for which modern medical technology can bring about sustained survival, must have been viable. Consequently, § 6(4) applies only to viable fetuses.

Given the substantiality of the state interest in protecting fetal life when there is a possibility of sustained survival and the lack of burden imposed upon the woman, § 6(4) is constitutional. The court of appeals erred in striking it and that holding should be reversed.

V. THE AMENDED VERSION OF SECTION 6(1) IS CONSTITUTIONAL

The amended version of § 6(1) requires that a physician use the method of abortion which is most likely to preserve the life and health of the fetus when he has determined that there is a reasonable likelihood of sustained survival of the fetus outside the womb.[28]

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[28] The full text of Section 6(1) as amended reads as follows:

> (a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his

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Thus, it applies only after fetal viability, and the determination of viability is left exclusively to the attending physician as required by this Court's precedents. *See Colautti v. Franklin*, 439 U.S. 379, 387 (1979). Amended §6(1) also specifies the required conduct—use of a method of abortion—that must be met. Furthermore, § 6(1) requires no "trade-off" in maternal life and health in favor of the state interest in fetal life.[29] Section 6(5) of the Illinois law as amended by H.B. 1399 limits the application of § 6(1) as follows:

> Nothing in Section 6 requires a physician to employ a method of abortion which, in the medical judgment of the physician performing the abortion based on the particular facts of the case before him, would increase medical risk to the mother.

Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1984 Supp.).

Accordingly, § 6(1) as amended fulfills all criteria of constitutionality for regulation of abortion after viability. The court of appeals refused to hold that a State may never regulate the method of abortion after viability. J.S. at App. 28. Its holding was based on vagueness. In fact, the court of appeals stated affirmatively that the State "may regulate

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> medical judgment most likely to preserve the life and health of the fetus.
>
> (b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.
>
> (c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(1)(a) commits a Class 3 felony.

Ill.Rev.Stat. ch. 38, ¶ 81-26(1) (1984 Supp.).

[29] The question of whether the State may legitimately require some degree of trade-off of maternal health in the interest of protecting fetal life or health is an open question, and not one presented in this case. *Cf. Planned Parenthood v. Ashcroft*, 655 F.2d 848, 863 n.24.

abortions at or after the stage of viability even if the State's regulations interfere with a woman's fundamental right to choose abortion." J.S. at App. 27 (footnote omitted).

The governing legal principles for amended § 6(1) are set forth in part III A of this brief. Thus, for the reasons set forth there, amended § 6(1) is constitutional.

VI. THE AMENDED VERSION OF SECTION 6(4) IS CONSTITUTIONAL

As set forth in Part II of this brief, a live case or controversy remains with respect to § 6(4) as amended. The court of appeals should have reviewed § 6(4) as it stood amended, but did not. The court's holding, however, is clearly controlling over both the amended and unamended versions of § 6(4). Since the court ruled upon unamended § 6(4), major treatment of the legal issues raised concerning § 6(4) has been set forth in Part IV of this brief dealing with the unamended provision. Because the issues remain the same regardless of which version is reviewed, those arguments apply with equal force to amended § 6(4).[30] Thus, for the reasons set forth in Part IV, amended § 6(4) is also constitutional.

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[30] The amended version of § 6(4) reads as follows:

> (a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable possibility of sustained survival of the fetus outside the womb, with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.
>
> (b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.
>
> (c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(4)(a) commits a Class 3 felony.

Ill.Rev.Stat. ch. 38, ¶ 81-26(4) (1984 Supp.).

CONCLUSION

The judgment and order of the court of appeals, insofar as they entered a permanent injunction against Sections 2(10) and 11(d), must be reversed. The judgment and order of the court of appeals insofar as they entered a permanent injunction against the unamended versions of Sections 6(1) and 6(4) must be reversed and remanded with directions to vacate the judgment and dismiss the cause as moot. If this Court should reach the merits of unamended Sections 6(1) and 6(4), the judgment of the court of appeals entering a permanent injunction against these sections must be reversed. If having reversed the judgment of the court of appeals on mootness, this Court should reach the merits of the amended versions of Sections 6(1) and 6(4), these provisions are constitutional and must be upheld.

Respectfully submitted,

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July 15, 1985

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE CONSTITUTION

U.S. Const. amend. XIV, § 1 (in pertinent part):

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ADDITIONAL STATUTORY PROVISIONS PRIOR TO AMENDMENT BY H.B. 1399 ON JUNE 30, 1984

§ 1. It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of

the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

It is the further intention of the General Assembly to assure and protect the woman's health and the integrity of the woman's decision whether or not to continue to bear a child, to protect the valid and compelling state interest in the infant and unborn child, to assure the integrity of marital and familial relations and the rights and interests of persons who participate in such relations, and to gather data for establishing criteria for medical decisions. The General Assembly finds as fact, upon hearings and public disclosures, that these rights and interests are not secure in the economic and social context in which abortion is presently performed.

Ill.Rev.Stat. ch. 38, ¶ 81-21 (1983).

"Viability" means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.

Ill.Rev.Stat. ch. 38, ¶ 81-22(2) (1983).

"Abortion" means the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with intent to cause fetal death.

Ill.Rev.Stat. ch. 38, ¶ 81-22(6) (1983).

"Fertilization" and "conception" each mean the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the vitelline membrane of the ovum.

Ill.Rev.Stat. ch. 38, ¶ 81-22(7) (1983).

"Fetus" and "unborn child" each mean a human being from fertilization until birth.

Ill.Rev.Stat. ch. 38, ¶ 81-22(9) (1983).

"Abortifacient" means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.

Ill.Rev.Stat. ch. 38, ¶ 81-22(10) (1983).

No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable on a form prescribed by the Department under Section 10 of this Law.

Ill.Rev.Stat. ch. 38, ¶ 81-25(1) (1983).

No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable, before or after birth, commits a Class 2 felony if the death of a viable fetus or infant results from such failure.

Ill.Rev.Stat. ch. 38, ¶ 81-26(1) (1983).

No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus

which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of the mother, with or without artificial support. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure.

Ill.Rev.Stat. ch. 38, ¶ 81-26(4) (1983).

Nothing in Section 6 requires a physician or any other person to employ any measures to encourage or sustain the life of the fetus during the course of a pregnancy termination which, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, would increase medical risk to the mother.

Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1983).

Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

Ill.Rev.Stat. ch. 38, ¶ 81-31(d) (1983).

ADDITIONAL STATUTORY PROVISIONS SUBSEQUENT TO AMENDMENT BY H.B. 1399 ON JUNE 30, 1984

"Abortion" means the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

Ill.Rev.Stat. ch. 38, ¶ 81-22(4) (1984 Supp.).

"Fertilization" and "conception" each mean the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the cell membrane of the ovum.

Ill.Rev.Stat. ch. 38, ¶ 81-22(5) (1984 Supp.).

"Fetus" and "unborn child" each mean an individual organism of the species homo sapiens from fertilization until live birth.

Ill.Rev.Stat. ch. 38, ¶ 81-22(6) (1984 Supp.).

When the fetus is viable no abortion shall be performed unless in the medical judgment of the attending or referring physician, based on the particular facts of the case before him, it is necessary to preserve the life or health of the mother. Intentional, knowing, or reckless failure to conform to the requirements of subsection (1) of Section 5 is a Class 2 felony.

Ill.Rev.Stat. ch. 38, ¶ 81-25(1) (1984 Supp.).

(a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or

without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act,[1] the available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section (6)(1)(a) commits a Class 3 felony.

Ill.Rev.Stat. ch. 38, ¶ 81-26(1) (1984 Supp.).

(a) No abortion shall be performed or induced when the fetus is viable unless there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for any child born alive as a result of the abortion. This requirement shall not apply when, in the medical judgment of the physician performing or inducing the abortion based on the particular facts of the case before him, there exists a medical emergency; in such a case, the physician shall describe the basis of this judgment on the form prescribed by Section 10 of this Act. Any physician who intentionally performs or induces such an abortion and who intentionally, knowingly, or recklessly fails to arrange for the attendance of such a second physician in violation of Section 6(2)(a) commits a Class 3 felony.

(b) Subsequent to the abortion, if a child is born alive, the physician required by Section 6(2)(a) to be in attendance shall exercise the same degree of professional skill, care and diligence to preserve the life and health of the child as would be required of a physician providing immediate medical care to a child born alive in the course of a pregnancy termination

which was not an abortion. Any such physician who intentionally, knowingly, or recklessly violates Section 6(2)(b) commits a Class 3 felony.

Ill. Rev. Stat. ch. 38, ¶ 81-26(2) (1984 Supp.).

(a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable possibility of sustained survival of the fetus outside the womb, with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(4)(a) commits a Class 3 felony.

Ill.Rev.Stat. ch. 38, ¶ 81-26(4) (1984 Supp.).

Nothing in Section 6 requires a physician to employ a method of abortion which, in the medical judgment of the physician performing the abortion based on the particular facts of the case before him, would increase medical risk to the mother.

Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1984 Supp.).

NEONATAL SURVIVAL RATE (%) BY BIRTH WEIGHT

Study #	Years of Study	# of Infants[e]	Jurisdiction	Birth Weight (Hundreds of Grams)																	
				<5	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
1[c]	1975-1976	187	Colo.		0	28	37	37	68	68	68	75	94	98						
2[c]	1976-1978	467	Ohio			20		56			73			87						
3[c]	1976-1979	894	Vt./N.H.	0		23		43			80			86			94		98	
4[b]	1974-1980	1,048	Colo.	0		27		55			79			89				95		
5[a]	1975-1980	60	Cal.			40 (> 50 since 1978)			82 (> 90 since 1979)											
6[b]	1980	56	N.C.				24			67										
7[c]	1979-1981	2,061[f]	Ala.	0	5	25	42	66	74	81	82	80	93	97	97	94	98	100	97	
8[a]	1980-1982	185	Wis.			16		53	52	70		84			98					
9[a]	1982-1983[d]	697[g]	Ala.			23		55	50	71										

[a] survival = infants discharged from hospital.

[b] survival = alive at 28 days.

[c] survival not clearly defined.

[d] study covered 10-year span; only most recent years included here since relevant survival rates were readily excisable.

[e] unless otherwise noted, represents only those infants weighing less than 2000 grams (the upper parameter in this chart); a particular study may include a greater number of infants.

[f] reflects total number of infants from entire study since exact number of infants weighing less than 2000 grams not ascertainable.

[g] reflects total number of infants from entire study since exact number of infants studied during 1982-83 not ascertainable.

NEONATAL SURVIVAL RATE (%) BY GESTATIONAL AGE

Study #	Years of Study	# of Infants[d]	Juris-diction	Gestational Age (Weeks[f]) 22	24	26	28	30	32	34	36
3[c]	1976-1979	1,156	Vt./N.H.	0	11	36 47 62	73 76	92	92 98	98 96	
4[b]	1974-1980	2,803	Colo.	0	11	55	84		93		99
10[a]	1977-1980	136	Mass.	28	10	44 60 92					
11[a]	1977-1980	62	N.Y.	36	38	61 76					
7[c]	1979-1981	2,061[e]	Ala.	17	9 18	29 53	57 67	86 92	91 99	94 97	99 100
8[a]	1980-1982	185	Wis.	0	37	37 68	85 82	81 91	100	100 100	100 100
12[b]	1982	619	U.K.	0	16	39 56 58					
13[c]	1979-1984	105	Tex.	0	50	28 67	100 88	100	95		

[a]survival = infants discharged from hospital.

[b]survival = alive at 28 days.

[c]survival not clearly defined.

[d]unless otherwise noted, represents only those infants of less than 37 weeks gestational age (the upper parameter in this chart); a particular study may include a greater number of infants.

[e]reflects total number of infants from entire study since exact number of infants less than 37 weeks gestational age not ascertainable.

[f]some studies estimated gestational age based on the last completed week and others on the nearest completed week; particular method of estimation utilized in each study not always ascertainable.

Source: Americans United for Life, Chicago

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EUGENE F. DIAMOND, M.D., and
JASPER F. WILLIAMS, M.D.,

Appellants

vs.

ALLAN G. CHARLES, M.D., et. al.,

Appellees,

and

THE HOPE CLINIC FOR WOMEN, LTD., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a justiciable case or controversy ceased to exist after state enforcement officials stopped defending the validity of the criminal statute before this Court?

2. Whether §§ 2(10) and 11(d), which impose criminal penalties upon persons who prescribe or administer substances "known to cause fetal death . . . whether or not the fetus is known to exist" are unconstitutionally vague and violative of a woman's right to privacy when making decisions about birth control?

3. Whether § 6(1)'s requirement that physicians performing abortions necessary to preserve the woman's life or health exercise the same standard of care toward the fetus "known to be viable" as the physician would use when delivering a full term infant, is unconstitutionally vague and elevates the life of the fetus over that of the woman?

4. Whether § 6(4), a criminal statute that requires a physician performing an abortion to exercise the same standard of care to preserve the life of a non-viable fetus as the physician would use when delivering a full-term infant, is unconstitutionally vague and deprives a woman of her right to privacy when making and effectuating the abortion decision?

5. Whether the most recent of repeated amendments to the Illinois Abortion Law rendered moot the cross-appeals from the district court's decision declaring § 6(1) constitutional and striking down § 6(4) as unconstitutional?

PARTIES

The intervenors below, Eugene F. Diamond, M.D., and Jasper F. Williams, M.D., filed this appeal. Dr. Williams died on April 15, 1985. Neither his estate nor a representative of that estate has asked to be, or has been, substituted in these proceedings. Neither of the state officials charged with enforcing the statute involved filed an appeal or joined the brief submitted by intervenor.

Plaintiffs below, Allan G. Charles, M.D., David Zbaraz, M.D., Marvin Rosner, M.D., Martin Motew, M.D., Arthur Watson, M.D., Robert Steptoe, M.D., and Hector N. Zevallos, M.D., representing a class of physicians who perform abortions as well as women patients seeking abortions, and the Hope Clinic For Women, Ltd. and National Health Care Services of Peoria, Inc., two facilities that provide abortion services, are appellees in this litigation.*

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* Hope Clinic For Women, Ltd., is affiliated with The Hope Medical Group of Shreveport, Louisiana.

OPINIONS BELOW

(See Brief of Intervenors)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on November 28, 1984. Intervenors' Notice of Appeal and Jurisdictional Statement were filed on February 28, 1985. Probable jurisdiction was noted on May 20, 1985. This Court's jurisdiction is invoked pursuant to Title 28, U.S.C. Section 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, article III, § 2.
   United States Constitution, amendment I.
   United States Constitution, amendment XIV, § 1.
2. Ill. Rev. Stat. ch. 38, ¶¶ 81-1 *et seq.*

STATEMENT OF THE CASE

A. History Of The Legislation

In the twelve years since this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973) ("*Roe*"), the Illinois General Assembly has displayed unyielding hostility to a woman's right of privacy. From the starting premise that human life begins at conception, Ill. Rev. Stat. ch. 38, ¶ 81-21, the General Assembly enacted the Illinois Abortion Law of 1975 ("Abortion Law"). Most operative provisions of the 1975 Illinois anti-abortion law were struck down. *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978) (three judge court) (11 provisions declared unconstitutional), *aff'd, Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979).

The Illinois General Assembly responded to this ruling by enacting essentially the same law in various amended forms, each of which in turn has been struck down by each federal district court and each panel of the Seventh Circuit that has considered them. Each version of this law has reflected the State's unconstitutional theory of when life begins. *Charles v. Carey*, No. 79 C 4541 (unpublished op. of Flaum, J.) (preliminary injunction on 1979 amendments); *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980) (preliminary injunction on 1979 amendments); *Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983) (permanent injunction on 1979 and 1983 amendments); *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984) (1979 and 1983 amendments); *Keith v. Daley*, No. 84 C 5602 (temporary restraining order on 1984 amendments). *See also Wynn v. Scott*, 448 F. Supp. 997 (N.D. Ill. 1978) (parental consent law preliminarily enjoined), *aff'd, Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1979) (preliminary injunction) and *Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) (permanent injunction); *Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984) (operative provision of Parental Notice of Abortion Law of 1983 enjoined), *aff'd in part, vacated in part*, 763 F.2d 1532 (7th Cir. 1985).

The four statutory provisions at issue here are the only sections of the 1979 amendments to the Abortion Law that remain contested. These 1979 revisions originated in Senate Bill 47 ("SB 47"), which also retained the unconstitutional purpose of the 1975 law that declared:

> the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

Ill. Rev. Stat. ch. 38, ¶ 81-21 (§ 1).

SB 47 articulated legislative defiance of the United States Constitution and effectuated that policy through its substantive provisions, including: § 2(8) ("human being" meant the individual from fertilization until death); § 2(9) ("fetus" and "unborn child" each meant a human being from fertilization until birth); § 3.5(2) (required physicians to provide each patient seeking an abortion with the statement that, "[t]he State of Illinois wants you to know that in its view the child you are carrying is a living human being"); and § 6(2) (made the Illinois homicide law applicable to abortion procedures). SB 47 contained 19 new criminal offenses relating to abortion, restricting every aspect of the decision and its effectuation. In most cases, violation of any of the restrictions was punishable as a Class 2 felony which carried as a penalty "not less than three

or more than seven years imprisonment." Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(5) (1983).

Neither this Court's recent decision in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) ("*Akron*"), reaffirming *Roe*, nor the decisions by the federal courts in the Seventh Circuit has deterred the Illinois General Assembly from enacting legislation sharply curtailing a woman's right of privacy. On June 30, 1984, the General Assembly enacted House Bill 1399 ("HB 1399"), which further amended the Abortion Law.[1] HB 1399 maintains the unconstitutional policies established by its predecessors. Section 1, declaring that human life begins at conception, is retained in its entirety. Many changes consist of merely renumbering prior sections which had been declared unconstitutional, including §§ 2(10) and 11(d).[2] Other nonsubstantive changes involve substituting the term "individual organism of the species homo sapiens" for the term "human being" in sections which had been declared unconstitutional for adopting the State's view that life begins at fertilization.[3] A group of obstetricians and gynecologists challenged the constitutionality of HB 1399 and, on July 1, 1984, secured a temporary restraining order against its enforcement. *Keith v. Daley*, No. 84 C 5602 (N.D. Ill. 1984). That restraining order remains in effect.

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[1] A copy of HB 1399 is found in Plaintiffs' Supplemental Appendix ("S.A.") at 12. Unlike other jurisdictions which, in response to the *Akron* decision, stopped enacting anti-abortion legislation, Brief Amici Curiae of ACLU and others, in *Thornburgh v. ACOG*, No. 84-495, at 28 & n.60, Illinois has continued its defiance of the *Roe* decision.

[2] In HB 1399, §§ 2(7) and 11(3) are verbatim replicas of §§ 2(10) and 11(d), which are challenged herein. Likewise, §§ 5(2), 11(3), 10(1), (3), (4), (5), (6), (9), and (11) of HB 1399 are renumbered versions of sections held unconstitutional in the *Charles v. Carey* litigation and not appealed.

[3] Amended § 2(6) and § 6(3), now articulate the State's view that the life of "an individual organism of the species homo sapiens" begins at fertilization. Their predecessors, previously enjoined, articulated the State's view that the life of a "human being" began at fertilization.

B. History Of The Litigation

Plaintiffs, who perform abortions and who also provide family planning services to their patients, challenged the constitutionality of SB 47 under 42 U.S.C. § 1983 on behalf of a class of all physicians performing abortions in Illinois and on behalf of their patients desiring abortions.[4] Had SB 47 gone into effect, physicians would have stopped performing pregnancy terminations for fear of criminal prosecution. (Charles affidavit, Joint Appendix ("J.A.") at 7-8; Keith affidavit, J.A. at 12-13; Zbaraz affidavit, J.A. at 24; Motew affidavit, J.A. at 52.) Named as defendants were those Illinois officials charged with implementing and enforcing SB 47: the Illinois Attorney General, the Director of the Illinois Department of Public Health and the State's Attorney of Cook County, who was sued in his official capacity and as the representative of the defendant class of all Illinois State's Attorneys.[5] Plaintiffs' motion for a temporary restraining order against the entire statute was granted on October 31, 1979.

Over plaintiffs' objection, the district court granted the motion of Eugene Diamond, M.D., Jasper F. Williams, M.D., and David Campbell to intervene as defendants on November 13, 1979. The order allowing intervention did not specify whether it was permissive or of right. The district court did not grant intervenors' request that they be appointed guardians ad litem for unborn fetuses.

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[4] *Hope Clinic for Women, Ltd. v. Scott*, No. 79 C 4548, a related case filed by three other physicians and two clinics which provide abortion services, was consolidated with this action.

[5] Pursuant to Illinois law, the Attorney General has represented the Director of the Department of Health throughout this litigation.

Diamond, a pediatrician who objects to abortion on moral grounds, moved to intervene as the parent of a minor daughter of child-bearing age and as a physician who claimed fiscal and professional interests in reducing the number of abortions. (Intervening Defendants' Motion to Intervene and Petition for Appointment of Guardian Ad Litem, S.A. at 4-6 (hereinafter "Motion to Intervene").) Diamond did not allege any personal or professional interests involving §§ 6(1), 6(4), or 2(10) in support of intervention; his purported interest in § 11(d) (motion to Intervene, S.A. at 4.) depended upon the parental notice provision, § 3.3, which was declared unconstitutional and thus no longer is at issue.

Williams, an obstetrician and gynecologist, also objected to abortion on moral grounds. He moved to intervene to defend the "rights and interests of his prenatal patients," and to protect his fiscal interest in receiving more patients should the number of abortions be reduced. (Motion to Intervene, S.A. at 8.) Williams claimed no personal interests in §§ 2(10) or 11(d); his alleged interest in § 6 was derivative of his desire to "defend the rights and interests" of unborn fetuses. David Campbell, no longer a party to this litigation, sought intervention as the spouse of a woman of child-bearing age. (Motion to Intervene, S.A. at 9.)

On November 16, 1979, the district court granted, in part, plaintiffs' motion for a preliminary injunction against numerous statutory provisions, including two of these at issue here, §§ 6(1) and 6(4). Plaintiffs and all defendants appealed the district court's ruling.[6]

The United States Court of Appeals for the Seventh Circuit affirmed the district court's injunction. *Charles v. Carey*, 627

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[6] The district court's opinion is found at page 1a of Plaintiffs' Motion to Dismiss or Affirm. The district court also enjoined the following sections: 2(2), 4, 5(1)-(3), 3.3, 3.4, that portion of 3.5(2) which required giving a pregnant woman printed information stating that abortion is the destruction of a human being, 9, 10(i), (j) and (l) and the third sentence of § 12.

F.2d 772 (7th Cir. 1980) ("*Charles I*"). Moreover, the court of appeals directed that several additional sections be preliminarily enjoined, including the remaining two sections at issue here, §§ 2(10) and 11(d).[7]

On remand, the district court enjoined §§ 2(10) and 11(d), as well as numerous other provisions. (Order of Aug. 7, 1980.) Plaintiffs renewed their motion for preliminary injunction as to several other provisions and moved for summary judgment asking that all of SB 47 be declared unconstitutional. The district court deferred its ruling on the motions until after the decision in *Akron*, 462 U.S. 416 (1983). The district court then reconsidered plaintiffs' motions, asked for supplemental briefs, and preliminarily enjoined many additional provisions of SB 47. *Charles v. Carey*, 579 F. Supp. 377, 384 (N.D. Ill. 1983) ("*Charles II*"). Subsequently §§ 2(10), 11(d), and 6(4), as well as 22 other sections of SB 47, were permanently enjoined. *Charles v. Carey*, 579 F. Supp. 464, 476 (N.D. Ill. 1983) ("*Charles III*").[8] The district court, however, declined

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[7] The court of appeals directed that the following sections also be enjoined: 6(6), 3.5(2), 3.2(A)(1)(a)(iii), 3.2(B)(1), 10(k), 6.2, portions of 3.2(A)(1)(a) and 3.2(A)(1)(b). *Charles I*, 627 F.2d at 792 n.36.

[8] During the three-month interval separating the decisions in *Charles II* and *Charles III*, the General Assembly enacted House Bill 666 ("HB 666"), amending § 2(2) to define viability as a "reasonable likelihood of sustained survival" rather than the previous, unconstitutional "more than momentary survival." Section 6(4) also was amended to apply when there is a possibility of sustained survival of the fetus. Although the district court found amended § 2(2) constitutional, it refused to lift the injunction on § 6(4), which penalized physicians who performed abortions prior to viability when there was but a "*possibility*" of "sustained survival" outside the womb. *Charles III*, 579 F. Supp. at 466, 475-77. (Emphasis added.)

to enter a permanent injunction against § 6(1). It found that the injunction of § 6(4) eliminated any unconstitutional confusion or inconsistencies between the two sections. 579 F. Supp. at 471-72.

Intervenors appealed, as did Attorney General Hartigan and State's Attorney Daley. Defendants, led by intervenors, chose to appeal only the district court's decision on §§ 2(10), 11(d) and 6(4). (J.A. at 131.) Intervenors did not appeal the injunction of the other 22 provisions. Plaintiffs cross-appealed, challenging the district court ruling that § 6(1) was constitutional. The State's interest in SB 47 waned after the decision in *Akron*. Neither Hartigan nor Daley filed a brief urging the court of appeals to uphold §§ 2(10), 11(d), 6(1) and 6(4), but merely adopted intervenors' briefs. (J.A. at 135, 137.) Likewise, neither chose to present oral argument before the court of appeals.

Prior to oral argument, intervenors advised the court of appeals that HB 1399 had been enacted. Despite the clear terms of Circuit Rule 11, intervenors did not inform the court that they considered the appeal moot on §§ 6(1) and 6(4). Instead, intervenors articulated this contention for the first time at oral argument. Intervenors, however, did not dismiss their appeal or withdraw their argument that §§ 6(1) and 6(4) were constitutional. In its decision, the court of appeals held that HB 1399 did not moot the appeal. *Charles v. Daley*, 749 F.2d 452, 456-57 (7th Cir. 1984) ("*Charles IV*"). The court of appeals also held that all four sections on appeal — §§ 2(10), 11(d), 6(1) and 6(4) — were unconstitutional.

Intervenors filed their notice of appeal to this Court and jurisdictional statement ("Juris. St.") on February 28, 1985. Contrary to intervenors' representations (Juris. St. 2), neither the Attorney General nor the State's Attorney filed a notice of appeal or joined in intervenors' jurisdictional statement.[9]

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[9] Intervenor Williams died on April 15, 1985. Thus, Diamond is the sole appellant now involved. Hereafter, he will be referred to as "intervenor," or "Diamond."

SUMMARY OF THE ARGUMENT

Intervenor's solitary defense of the Illinois criminal abortion statute, even after state officials apparently concede its unconstitutionality, does not present a justiciable "case or controversy." The lack of an Article III case or controversy between the real parties in interest here — plaintiff-physicians who risk prosecution under the challenged statute and the state defendants charged with enforcing the statute — requires dismissal for lack of jurisdiction. *Princeton University v. Schmid*, 455 U.S. 100 (1982) (per curiam).

Sections 2(10) and 11(d), which require that certain undefined drugs and devices be labeled as "abortifacients," must be analyzed in accordance with the expressed statutory purpose: that human life begins at the moment the ovum is penetrated by the sperm. These forced speech requirements are designed to advance the State's view of human life and to discourage women from using certain birth control devices, and thus infringe upon a woman's right of privacy and violate plaintiffs' First Amendment rights. Sections 2(10) and 11(d) also have a broad reaching but undefined scope and thus are unconstitutionally vague.

Section 6(1) establishes a physician's obligation to a viable fetus. This section does not, however, clearly leave the viability determination to the attending physician. Therefore, § 6(1) is unconstitutionally vague. *Colautti v. Franklin*, 439 U.S. 379 (1979) ("*Colautti*"); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) ("*Danforth*"). It is uncertain whether § 6(1) allows a physician, when selecting an abortion technique and when performing the actual termination, to consider his duty to preserve the woman's life and health paramount to his duty to preserve the fetus. Thus, § 6(1) further contravenes express holdings of this Court that regulations of post-viability abortions may not limit a woman's right to receive her physician's best medical advice nor deny the physician the necessary discretion to effectuate the abortion decision. *Akron*, 462 U.S. at 416; *Colautti*, 439 U.S. at 379.

Section 6(4), which imposes the same standard of care as does § 6(1), shares § 6(1)'s unconstitutional vagueness and

impermissibly infringes upon a woman's right to exercise the abortion decision consonant with her best interests. Further, § 6(4) strictly regulates abortion prior to viability and imposes upon the physician a duty of care toward a fetus that is not capable of sustained and meaningful existence outside the womb. Once again, unequivocal holdings of this Court delineating the limits of permissible abortion regulation have been disregarded. *Colautti*, 439 U.S. 379; *Danforth*, 428 U.S. 52.

The constitutionality of the H.B. 1399 amendments to §§6(1) and 6(4) is not properly before this Court. Amended §§ 6(1) and 6(4) are presently under review in the United States District Court of the Northern District of Illinois in *Keith v. Daley*, No. 84 C 5602. Intervenor is not a party to that case. Intervenor's assertion that amended §§ 6(1) and 6(4) present only legal questions is incorrect and contrary to his representations in the court of appeals, which declined to review these provisions as amended. Moreover, this Court has declined to review superseding statutes as an original matter; there is no reason to depart from this well established principle.

Finally, the amendments to §§ 6(1) and 6(4) did not moot the issue of their constitutionality. Illinois' most recent of repeated amendments to §§ 6(1) and 6(4), while on appeal, is nothing more than a voluntary cessation of a challenged practice which did not moot the case before the court of appeals. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982).

ARGUMENT

I. INTERVENOR, WHO ASSERTS MERELY HIS GENERALIZED GRIEVANCES AGAINST ABORTION, FAILS TO PRESENT A JUSTICIABLE "CASE OR CONTROVERSY" TO THIS COURT.

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (*"Valley Forge"*). No Article III "case or controversy" is presented in this appeal: intervenor is not the proper party to request adjudication of the constitutionality of a statute the State itself has chosen not to defend. Nor does intervenor's personal moral opposition to abortion constitute the Article III "case or controversy" that this Court has demanded of every party seeking to invoke its jurisdiction.

Plaintiffs named as defendants state officials who have the statutory duty both to prosecute plaintiffs under the challenged law and to defend its constitutionality. The duty for initiating criminal prosecutions clearly lies with the State's Attorneys in the 102 Illinois counties. Ill. Rev. Stat. ch. 14, ¶ 5 (1983). Illinois law vests only the Attorney General with authority to defend the constitutionality of a state statute challenged in federal court. Ill. Rev. Stat. ch. 14, ¶ 4 (1983).

Plaintiffs initiated this lawsuit under 42 U.S.C. § 1983, which requires allegations of state action on the part of the defendant. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). Plaintiffs could not have named intervenor as a defendant to this suit because, as a private party, he lacks authority either to defend this state criminal statute or to initiate any prosecutions under it.[10] Intervenor concedes as much. In his brief contesting

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[10] Intervenor's attempt to continue his private defense of this § 1983 lawsuit, without the state actors, undermines this Court's careful shaping of the state action doctrine to reflect the fundamental distinctions between state and private conduct. *See, e.g., Blum v.*

(Footnote continued on following page.)

the assessment of attorney's fees, he admitted his lack of legal interest in this case:

> [I]ntervenors did not and could not have violated plaintiffs' constitutional rights in any manner. They did not enact the law and cannot administer or enforce the state law which was held to violate plaintiffs' constitutional rights.

(Brief in Opposition to Plaintiffs' Petition for Attorney's Fees Against Intervenor-Defendants at 7, filed Dec. 28, 1984).[11]

Neither the Attorney General nor the State's Attorney appealed the Seventh Circuit's decision enjoining this criminal statute. Pursuant to Supreme Court Rule 10.4, "[a]ll parties to the proceedings in the court from whose judgment the appeal is being taken shall be deemed parties in this Court, . ." even if they did not file a notice of appeal. The state defendants have not joined intervenor after this Court noted probable jurisdiction, nor have they filed a brief or adopted intervenor's brief, as each had done before the court of appeals.[12] Thus, the case or

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(Footnote continued from preceding page.)

Yaretsky, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

[11] In a further attempt to avoid liability for attorney's fees, intervenor himself has admitted that he is not the appropriate party to continue this litigation. In a motion submitted to the district court, counsel for intervenor asked that an organization, Americans United For Life ("AUL"), be substituted in place of Diamond as the sole intervening defendant. In that motion, counsel stated that Diamond had been solicited by AUL to participate in this litigation and that AUL, not Diamond, was the party interested in this litigation. Intervenor requested that AUL be substituted in his place "for all purposes, including the assessment of attorney's fees." (Motion to Amend Judgment at 3-4, filed May 2, 1985).

[12] Mr. Hartigan filed a letter with the Clerk of the Supreme Court, dated July 15, 1985, stating only that "[t]he Illinois Attorney General's interest in this proceeding is identical to that advanced by it

(Footnote continued on following page.)

controversy between plaintiffs and the only defendants who could enforce the challenged statute is concluded. An intervenor with no enforcement authority cannot resurrect this expired litigation.

This Court's decision in *Princeton University v. Schmid*, 455 U.S. 100 (1982) (per curiam) ("*Schmid*"), precludes intervenor's independent attempt to create Article III jurisdiction. In *Schmid*, the State of New Jersey charged and convicted Schmid of criminal trespass for distributing leaflets on the Princeton University campus. While Schmid's appeal was pending, the New Jersey Supreme Court invited Princeton to intervene. Schmid's conviction was reversed and Princeton appealed to this Court. The State did not file a separate jurisdictional statement but joined in Princeton's. In its brief, the State declined to take a position on the merits.

This Court dismissed Princeton's appeal, holding that no case or controversy existed between the real parties in interest — the state enforcement agency and the party challenging the constitutionality of the governmental enforcement policy. Intervenor Princeton thus had no independent authority to continue the appeal. 455 U.S. at 102.[13] *See also City of Chicago v. Chicago Rapid Transit Co.*, 284 U.S. 577, 578 (1931). Similarly, intervenor Diamond has no authority to continue his private "defense" of a state criminal statute.[14]

(Footnote continued from preceding page.)

in the lower courts and is essentially coterminous with the position on the issues set forth by the appellants." If this letter were intended to convey Mr. Hartigan's position on the merits of continuing this litigation, it certainly does not satisfy Rule 34(1) of this Court which directs that a party's "brief" clearly set forth his argument, including the points of fact and law being presented.

[13] This Court also held that Princeton's defense of its leafletting regulation was moot because Princeton had amended this regulation. 455 U.S. at 103. Unlike this case, see *infra* pp. 46-49, there was no suggestion that Princeton's new regulation did not eradicate the constitutional problem or that any violation was likely to recur.

[14] That the district court found intervention appropriate does not establish that intervenor had Article III standing. A proposed

(Footnote continued on following page.)

Intervenor claimed no justiciable interest in any of the four provisions before this Court when he sought to intervene below. That intervenor's moral opposition to abortion conceivably might be vindicated by the State's enforcement of these criminal sanctions against physicians who perform abortions does not evince a live case or controversy. This Court has held repeatedly that a private interest that is nothing more than an abstract injury — a generalized grievance — is not justiciable. *See, e.g., Allen v. Wright,* 104 S. Ct. 3315, 3326-27 (1984); *Valley Forge,* 454 U.S. at 482-83; *Linda R.S. v. Robert D.,* 410 U.S. 614, 619 (1973).[15] This generalized grievance, no matter how strongly felt or vigorously advocated, does not provide the requisite "case of controversy" demanded by Article III.

II. SECTIONS 2(10) AND 11(d) IMPERMISSIBLY INFRINGE UPON A WOMAN'S RIGHT OF PRIVACY AND ARE UNCONSTITUTIONALLY VAGUE.

Sections 2(10) and 11(d), in conjunction, require all persons who sell, prescribe, or administer any substance or device that is "known to cause fetal death" to describe it as an abortifacient, "whether or not the fetus is known to exist when such substance or device is employed." Failure to comply is a criminal offense.[16]

(Footnote continued from preceding page.)

intervenor need not demonstrate standing before he will be allowed to participate in an ongoing lawsuit *United States v. Board of School Commissioners,* 466 F.2d 573 (7th Cir. 1972). This Court may always question the standing of a litigant, *Warth v. Seldin,* 422 U.S. 490, 498-99 (1975), and indeed has the obligation to do so whenever its Article III jurisdiction is in question.

[15] In these cases, plaintiffs, rather than a defendant, sought to have the government enforce a particular law in conformity with their personal views. Intervenor is asserting the same non-justiciable interest asserted by plaintiffs in *Allen, Valley Forge,* and *Linda R.S.* If anything, intervenor's interest is even more attenuated: he must first defend the constitutionality of the challenged sections before he can advocate their enforcement.

[16] Section 2(10) provides in full:

"Abortifacient" means any instrument, medicine, drug, or any

(Footnote continued on following page.)

Neither the State nor the intervenor has ever offered a comprehensive construction of this criminal statute.[17] The uncertainty of the meaning and scope of these requirements not only makes the statute void for vagueness, *infra* at 25-27, but also creates a burden on privacy rights by deterring doctors and others from providing necessary birth control services. It is clear from examining §§ 2(10) and 11(d) in the context of the Abortion Law that the General Assembly intended these particular requirements to advance its view that human life

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(Footnote continued from preceding page.)

> other substance or device which is known to cause *fetal death* when employed in the usual and customary use for which it is manufactured, *whether or not the fetus is known to exist when such substance or device is employed.* (Emphasis added.)

Section 11(d) provides in full:

> Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

A Class B misdemeanor is punishable by imprisonment of up to six months, Ill. Rev. Stat. ch. 38, ¶ 1005-8-3(a)(2) (1983), and fines of $500, Ill. Rev. Stat. ch. 38, ¶ 1005-9-1(a)(3) (1983). A Class C misdemeanor can result in imprisonment of 30 days, Ill. Rev. Stat. ch. 38, ¶ 1005-8-3(a)(3) (1983), and fines of $500, Ill. Rev. Stat. ch. 38, ¶ 1005-9-1(a)(3) (1983).

[17] The only interpretation given this statute was set forth by plaintiffs who feared they would be prosecuted for prescribing certain birth control substances unless they described those substances as abortifacients. (*See* Charles affidavit, J.A. at 4; Zbaraz affidavit, J.A. at 22; Motew affidavit, J.A. at 55.)

begins at fertilization, and interference with a fertilized ovum, therefore, is the killing of a human being.[18]

Sections 2(10) and 11(d) require health professionals to tell all women who receive certain drugs or devices, regardless of whether the woman is pregnant or whether the drugs are for birth control or other reasons, that the substance is an "abortifacient" which causes "fetal death." By communicating its view that certain birth control measures destroy human life, the State thus seeks both to limit the use of these contraceptives and to propagandize its theory of when life begins. This imposition of one theory of life not only places an unconstitutional burden on reproductive privacy rights governed by *Carey v. Population Services International*, 431 U.S. 678 (1978) ("Carey"), and *Roe*, 410 U.S. 113 (1973), but also deeply offends the First Amendment. The principles of that Amendment prohibit the State from forcing private parties to be agents for the State's dissemination of certain ideological, religious or political views. *Wooley v. Maynard*, 430 U.S. 705 (1977).

A. Sections 2(10) And 11(d) Burden A Woman's Right Of Privacy When Making A Decision Pertaining To Birth Control.

1. These provisions require transmission of information that is contrary to accepted medical practice.

Plaintiffs challenged §§ 2(10) and 11(d) because they impair the right of women patients to receive their physicians'

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[18] As set forth in the Statement of the Case, *supra*, § 1 of the Abortion Law reaffirms the long-standing policy of the State of Illinois that "the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life. . . ." The Abortion Law as amended by SB 47 equates conception with fertilization of the ovum with the sperm, Ill. Rev. Stat. ch. 38, ¶ 81-22(7), and defines the fetus as existing from fertilization until birth. Ill. Rev. Stat. ch. 38, ¶ 81-22(9). *See also* § 3.5.(2), Ill. Rev. Stat. ch. 38, ¶ 81-23.5.(2).

best medical advice and require transmission of information that was "medically unjustified" and "scientifically questionable." (Charles affidavit, J.A. at 4; Motew affidavit, J.A. at 50.) At the very least, §§ 2(10) and 11(d) regulate several methods of birth control that interfere with the fertilized ovum, including the intrauterine device (IUD), and diethylstilbestrol ("DES" or "stilbestrol"), a drug given rape victims to prevent pregnancy. (Charles affidavit, J.A. at 4; Zbaraz affidavit, J.A. at 22; Motew affidavit, J.A. at 50). To comply with this law, physicians must describe the IUD and stilbestrol as "abortifacients."

Describing the IUD and stilbestrol as abortifacients, albeit under threat of criminal prosecution, is to accept intervenor's personal distinction between "abortifacient methods of birth control" and "contraceptive methods of birth control." His distinction equates conception with fertilization, a conclusion controverted by most of the medical profession.

According to standard medical authorities, conception is not synonymous with fertilization of the ovum. Rather, conception — pregnancy — occurs six to seven days later, when the fertilized egg, now called a blastula or blastocyst, becomes implanted in the uterine wall. J. Pritchard & P. MacDonald, Williams, Obstetrics at 89 (17th ed. 1985).[19] Conception does not occur each time an ovum is fertilized; only fifty percent of fertilized ova ultimately become implanted. *Post-Coital Con-*

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[19] *See also* Dorland's Illustrated Medical Dictionary at 296 (26th ed. 1985); Obstetric-Gynecologic Terminology, Section 6: Physiology of Reproduction at 299 (Hughes ed. 1972); Milby, *The New Biology and the Questions of Personhood: Implications for Abortion*, 9 Amer. J. Law & Med. 31, 35 (1983). In the past, the distinction between "fertilization" and "conception" was not so carefully delineated. New research in reproductive endocrinology, however, isolated two distinct phases of fertilization and, then, implantation or conception. *See generally* J. Pritchard & P. MacDonald, Williams, Obstetrics, 79-96 (17th ed. 1985). Section 2(7) of SB 47, which provides that "fertilization" and "conception" each means "the fertilization of a human ovum by the human sperm . . . ," makes it clear that the State of Illinois does not distinguish between fertilization and implantation.

traception, The Lancet, 1983, i:856 By adopting a theory of conception — and contraception — contrary to accepted medical practices,[20] and enforcing that theory by the threat of criminal prosecution, §§ 2(10) and 11(d) offend the constitutional limitations on state regulation recognized in *Roe* and reaffirmed in *Akron*. *Akron*, 462 U.S. at 434.

Even accepting intervenor's inaccurate definition of conception, contraceptives regulated by these sections do not always work by preventing implantation. Non-medicated IUDs most often prevent the blastocyst from implanting.[21] IUDs, however, also: impair sperm motility; inhibit ovulation; and act as a spermicide.[22] Likewise, stilbestrol prevents pregnancy by: making the endometrium inhospitable to implantation if fertilization has occurred; inducing early onset of menstruation; and inhibiting ovulation.[23]

Physicians must tell all IUD and stilbestrol patients that these devices are abortifacients, "whether or not the fetus is known to exist when such substance or device is employed," and regardless of whether the device will stop implantation. To require physicians to inaccurately describe IUDs, stilbestrol and other contraceptives to women who are not pregnant burdens women's health interests by interfering with the judgment and

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[20] Interestingly, intervenor, a physician, bases his theory of conception and contraception on Webster's Unabridged Dictionary rather than accepted medical texts. (Int. Br. 13, 22.)

[21] Mishell, *Intrauterine Devices*, 11 Clinics In Obstet. & Gynecol., No. 3 at 679-80 (1984).

[22] *See, e.g.*, Lippes, *Non-medicated IUDS: History, Mechanism of Action, and Clinical Effectiveness*, 6 Gynec. & Obstet. at 1, 4-5 (1985 rev. ed.); Mishell, *Intrauterine Devices*, 11 Clinics In Obstet. & Gynecol., No. 3 at 679 (1984).

[23] Johnson, *Contraception—The Morning After*, 16 Fam. Plan. Pers. 266, 267 (1984). Post- coital contraceptives are not advocated as a substitute for conventional methods of contraception. *Id.* Rather, they are used as an emergency measure in the cases of rape and contraception failure, an option that, in the words of one researcher quoted by intervenor "is surely preferable to abortion." *Id.* at 267.

advice of their physicians. Thus, §§ 2(10) and 11(d) contravenes *Akron's* express holding that if "a substantial portion of the . . . State's regulation 'depart[s] from accepted medical practice,' . . . it may not be upheld . . ." *Akron*, 462 U.S. at 434.[24]

2. **These statutory provisions are designed to influence a woman against choosing birth control that is contrary to the State's theory of life and undermine, rather than promote, informed consent.**

Intervenor's contention that § 2(10) and § 11(d) are merely informed consent provisions that provide women with "accurate information" needed for making a decision about birth control (Int. Br. 12-16) does not withstand scrutiny. First, the information a woman needs to make her choice is already available. Second, §§ 2(10) and 11(d) do not require physicians to give "accurate information" about the many health risks associated with at least two of the substances governed by these provisions, the IUD and stilbestrol.

Women have information explaining the pregnancy-preventing properties of the various substances at issue here. Under Illinois common law, physicians have an affirmative duty to apprise patients of facts concerning their health. *Goldberg v.*

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[24] Intervenor suggests the court of appeals struck down §§ 2(10) and 11(d) on the basis of an "untrammelled right" by physicians to exercise their profession. (Int. Br. 19.) This not only distorts the holding of the court of appeals but also disregards this Court's most recent decision in this area. As reaffirmed in *Akron*, a woman cannot effectuate certain decisions, such as terminating a pregnancy or using prescriptive contraceptives, without the assistance of the physician. Therefore, the State may not interfere with the physician-patient consultation, particularly during the first trimester of pregnancy, *Akron*, 462 U.S. at 434, 445, or, as here, before pregnancy even begins. Relying upon *Akron*, the court of appeals struck down §§ 2(10) and 11(d) because requiring physicians to communicate the prescribed information, regardless of the woman's medical prognosis constituted an unacceptable intrusion upon the physician-patient relationship. *Charles IV*, 749 F.2d at 462.

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Ruskin, 128 Ill. App. 3d 1029, 1039-40 (1st Dist. 1984). Federal requirements are even more specific: women for whom IUDs are prescribed must receive a patient brochure, prior to insertion, which fully explains the IUD, its pregnancy-preventing properties, and its health risks.[25] This brochure describes the IUD as a contraceptive (not an abortifacient) that prevents implantation of the fertilized egg. 21 C.F.R. § 310.502 at 52 (1985).

Federal law also governs the use of stilbestrol. Federal regulations describe this substance as a contraceptive (not an abortifacient) and provide the woman with information about the drug and any side effects related to its use. 21 C.F.R. § 310.501 at 44-45 (1985). In particular, the patient information states that "this drug [stilbestrol] will not cause an abortion if you are already pregnant." 21 C.F.R. § 310.501 at 44 (1985). The patient thus is faced with a federal description of this drug directly contrary to that which §§ 2(10) and 11(d) require her physician to communicate.

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Intervenor mistakenly relies upon *Whalen v. Roe*, 429 U.S. 599 (1977), as justification for these broad regulations of physicians. *Whalen* involved recording prescription narcotic drugs, not the regulation of a fundamental right, such as that involved here. To sustain these sections based on *Whalen* would ignore the potential impact of placing "obstacles in the path of the doctor upon whom [the woman] is entitled to rely for advice in connection with her decision." *Akron*, 462 U.S. at 416, *citing Whalen*.

[25] This brochure explains: (1) the effectiveness of the IUD; (2) previous medical problems that might make the IUD unsuitable as a method of contraception for the particular woman; (3) adverse reactions and side effects that might be caused by the IUD; (4) directions for use; and (5) warnings concerning particular situations such as bleeding and exposure to venereal disease. 21 C.F.R. § 310.502 at 52-54 (1985). Each patient is given this brochure prior to use, provided the opportunity to read it and "discuss fully any questions she may have concerning the IUD as well as other methods of contraception." 21 C.F.R. § 310.502 at 51 (1985).

Akron established unequivocally that only a legitimate health interest justifies state regulation of abortion and that that health interest becomes compelling enough to justify regulation only after the onset of the second trimester of pregnancy. *Akron*, 462 U.S. at 428-29. The thoroughness of the federal regulations,[26] compared with the absence of any health-related information in §§ 2(10) and 11(d), conclusively rebuts intervenor's argument that the challenged sections merely require "the giving of [health-related] information to the patient as to just what would be done and its consequences." *Danforth*, 428 U.S. at 67 n.8.

The only interest §§ 2(10) and 11(d) advance is the State's concern for the potential fertilized egg, defined by § 2(9) as the fetus. This "interest" is not compelling prior to viability, *Akron*, 462 U.S. at 428, and therefore does not justify regulation here, prior to pregnancy. Illinois women, nonetheless, are burdened with listening to the State's view of conception and life before they may exercise their fundamental right to use birth control.[27] If the State cannot justify its

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[26] The Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.* (amended 1984), under which the IUD and stilbestrol regulations were promulgated, preempts this attempt by the State of Illinois to further regulate these contraceptives. The Medical Device Amendments of the FDCA, 21 U.S.C. §§ 360a-k, is an unequivocal declaration by Congress that it occupies and preempts the field of regulating contraceptive devices. These amendments preempt any state regulation which "relates to" and is "different from the federal law." 2 U.S.C. § 360k(a). Obviously, the Illinois law, which would define the IUD, for example, as an abortificient is different from the federal law. Thus, §§ 2(10) and 11(d) are preempted by the FDCA. For a complete discussion of the preemptive effect of the FDCA, see Brief of Amici Curiae, Planned Parenthood, *et al.*, in *Diamond v. Charles*, No. 84-1379, at 19-22. *See also* 21 C.F.R. § 808.01; *National Women's Health Network v. A.H. Robins Co., Inc.*, 545 F. Supp. 1177 (D. Mass. 1982).

[27] Intervenor's citation of *Danforth*, 428 U.S. 52 (1976), and *Akron*, 462 U.S. 416 (1983), thus is inapposite. These cases leave undisputed that an informed consent provision is valid *only* if it

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regulation of abortion by defining life, *Roe*, 410 U.S. at 159-62,[28] it certainly may not justify regulation of contraception or birth control by adopting a certain theory of life. *Charles IV*, 749 F.2d at 462.

B. The Forced Speech Aspects Of Sections 2(10) And 11(d) Run Afoul Of The First Amendment.

Under § 11(d)'s threat of criminal prosecution, a physician is forced to make certain pronouncements about the nature of certain birth control substances and the beginning of human life, with which he may profoundly disagree. This unquestionably forces the physician to "act as the mouthpiece of the State," a violation of his or her First Amendment rights. *Charles IV*, 749 F.2d at 462; *Charles I*, 627 F.2d at 789.

Intervenor asserts that §§ 2(10) and 11(d) do not burden any woman seeking contraceptives (Int. Br. 22) but exist solely to advance the interests of those women who, for religious or moral reasons (Int. Br. 11), oppose methods of birth control that act upon the fertilized ovum. By making this accom-

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advances the State's interest in protecting the health of the *pregnant* woman making that choice. The women affected by §§ 2(10) and 11(d) are not pregnant. By their express terms, §§ 2(10) and 11(d) require the abortifacient labeling "whether or not the fetus is known to exist." Intervenor does not, indeed cannot, cite any decision of this Court approving regulation of non-pregnant women on behalf of non-existent fetuses.

[28] Relying upon *Roe*, the district court enjoined sections 2(9), 2(10), and 11(d). *Charles II*, 579 F. Supp. at 379; *Charles III*, 579 F. Supp. at 475. Intervening defendant has not appealed the injunction on § 2(9). HB 1399 did not repeal § 2(9), contrary to the assertion made by the Acting Solicitor General. (S.G. brief at 15, n.3.) P.A. 83-1128, § 2. Rather than abandon the theory of human life advocated by § 2(9), the General Assembly in HB 1399 merely renumbered it as § 2(6), which now provides:

> "Fetus" and "unborn child" each mean an individual organism of the species homo sapiens from fertilization until live birth.

odation defense intervenor disregards the expressed purpose of the Abortion Law, as stated in § 1 which, together with §§ 2(10) and 11(d) requires transmission of misleading information that presents one theory of human life.[29]

That some women may accept the State's theory of life is not a compelling constitutional reason to impose §§ 2(10) and 11(d) upon all physicians and their female patients. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). *See also West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).[30] This First Amendment interest is particularly strong when the State compels speech on a controversial issue, such as birth control. *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2282 (1985).

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[29] Governmental purpose when regulating fundamental rights cannot be disregarded, particularly when that purpose is hostile to the right at issue. This Court recently relied upon an improper governmental purpose in finding that the Alabama moment of silence statute violated the First Amendment. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2492 (1985).

[30] Intervenor's citation of *In re R.M.J.*, 455 U.S. 191 (1982), and *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985), in support of this forced speech disregards not only the context in which these cases evolved but also their holdings. These cases involved professional advertising — commercial speech — which receives less First Amendment protection than does other speech. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64-65 (1983). In both cases, this Court substantially upheld the attorney's First Amendment right to engage in the challenged speech. Neither case allowed broad, unreviewed state regulation of speech, particularly speech concerning a fundamental right. More specifically, in neither case were professionals required to deliver a state proscribed message or face criminal prosecution. The speech involved in the doctor-patient communications is not advertising. As this Court recognized in *In re R.M.J.*, it is professional advertising that poses a special risk of deception, not all speech by professionals to their clients or patients. 455 U.S. at 200, *citing Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Intervenor's argument that physicians are not required to use the statutory language of "abortifacient" and "fetal death" when conferring with patients is unpersuasive.[31] This construction is inconsistent with earlier constructions offered by intervenor. In the court of appeals, intervenor consistently argued that §§ 2(10) and 11(d), at the least, require a physician to report to the woman "that he is administering an abortifacient." ("Int. Opening Br. at 6-7, filed May 23, 1984.) Intervenor gave the same construction in the court of appeals during *Charles I*, and further stated; that the term "[a]bortifacient is thus specifically designed to identify *products* which are administered in order to cause fetal death *if the fetus exists or should the fetus come into existence.*" (Int. Jt. Memo., filed Nov. 28, 1979 (emphasis original).)[32]

Intervenor's contention in this Court that "[t]he precise manner in which the doctor discloses [the abortifacient] information is left entirely to his discretion" (Int. Br. 11-12) disregards the coercive force of a criminal law. Given the statutory mandate that requires the abortifacient label "whether or not the fetus is known to exist," a physician "[f]aced with the penalties that would accrue . . . might well conclude that the safe course is to avoid controversy," *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974), and therefore use the precise statutory language.

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[31] No state enforcement official has ever independently advanced the limiting construction now advanced by intervenor for purposes of litigation in this Court. Indeed, Attorney General Hartigan and State's Attorney Daley have never advanced any construction, but merely have adopted intervenor's court of appeals briefs. Arguments of counsel, particularly non-governmental counsel, are entitled to little weight as a valid limiting construction. *Investment Co. Inst. v. Camp.*, 401 U.S. 617, 627-28 (1971).

[32] Most of the alternative terms offered by intervenor (Int. Br. 12) — "causes an abortion," "causes fetal death," "kills unborn children" — only emphasize the integral and impermissible relationship between the challenged statutes and the State's theory that life begins at fertilization.

C. The "Informed Consent" Requirements In §§ 2(10) And 11(d) Are Unconstitutional Because They Are Uncertain In Scope And Vague As To Meaning.

The constitutional infirmities of §§ 2(10) and 11(d) are compounded by their vagueness, offending due process in three related ways. They fail to afford persons "a reasonable opportunity to know what is prohibited"; they fail to provide explicit standards for those who apply them, inviting arbitrary and discriminatory enforcement; and, they operate "to inhibit the exercise of . . . [protected] freedoms . . . [by] inevitably lead[ing] citizens to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Sections 2(10) and 11(d) fail to give clear guidelines as to what conduct is required, and under what circumstances.

First, intervenor relies on § 2(10)'s definition of abortifacient to cure any uncertainty about what substances are governed by the mandatory warning of § 11(d). (Int. Br. 9.) This definition only compounds the confusion. Section 11(d) appears to impose criminal liability when the person is "selling, administering, or prescribing" a substance "which he knows [subjectively] to be an abortifacient, and which is in fact an abortifacient, . . ." Section 2(10), upon which § 11(d) depends, countermands that subjective knowledge requirement by defining abortifacient according to an objective standard of knowledge, *i.e.*, "any substance or device *known* to cause fetal death." (Emphasis added.) Because it is "unclear whether [this criminal] statute imports a purely subjective standard, or whether it imposes a mixed subjective and objective standard," it is void for vagueness. *Colautti*, 439 U.S. at 391.

Second, these provisions do not clearly delineate what substances are considered "abortifacients." Literally hundreds of drugs and devices are suspected to increase the chances of spontaneous abortion which arguably would "cause fetal death" under the statute.[33] Persons uncertain of the applicability of the "abortifacient" label may nonetheless face prosecution.

Third, § 11(d) has a separate prohibition which attempts to stop completely the sale of certain birth control substances. The first criminal provision in § 11(d) forbids "any person" from selling an abortifacient, as defined by § 2(10), "unless upon prescription of a physician. . . ." Read literally, § 11(d) forbids drug manufacturers from selling products which come under § 2(10)'s definition because doctors do not and cannot write prescriptions directly to drug manufacturers. Manufacturers who sell to drug wholesalers, hospitals and pharmacists are exempt from federal requirements that certain drugs and devices be dispensed only by prescription. 21 C.F.R. § 201.100 (1985). Under §§ 2(10) and 11(d), however, these drug manufacturers could not market their contraceptive products in Illinois. Such a total ban on contraceptive sales contravenes the decision in *Carey*, 431 U.S. 678 (1977).

Fourth, § 11(d)'s lack of clarity is exacerbated when read in conjunction with § 11(f) of SB 47, or its successor, § 11(4) in HB 1399.[34] Section 11(f) makes it a Class 2 felony for any

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[33] Anti-malarial drugs such as quinine, chloroquin, coumarin anti-coagulants, chloramphenicol, thiazide diuretics, insulin (shock) and polio vaccine, all may cause "fetal death" or spontaneous abortion. *See, e.g.*, Strombino, *et al., Chemical and Physical Exposure of Parents: Effects on Human Reproduction and Offspring*, J. Early Human Development, 371-399 (1978); Wilson, J.G. and Frasier, F.C. eds., Handbook Of Teratology, Vol. 1: General Principles and Etiology (1977), Schardin, J.L. ed., Drugs As Teratogens (1976).

[34] Sections 2(10) and 11(d) although renumbered by HB 1399 as §§ 2(7) and 11(3), remain a part of the Abortion Law. Thus, the

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person to "perform . . . an abortion procedure upon a woman who is not pregnant. These three provisions create an unavoidable "catch-22" threat of prosecution for physicians.

Under §§ 2(10) and 11 (d), a physician is compelled to apply the abortifacient label "whether or not the fetus is known to exist." According to intervenor, a physician could explain certain birth control substances as "caus[ing] an abortion." (Int. Br. 12.) A physician who uses this language when giving a woman an IUD would be subject to prosecution under § 11(f) for performing what *is represented to be an abortion* upon a woman who is not pregnant. Thus, if the physician complies with § 11(d), § 11(f) may be invoked. If, however, the physician declines to apply the abortifacient label because of § 11(f), he or she may be prosecuted under § 11(d).

In summary, §§ 2(10) and 11(d) do not provide either the persons regulated or the enforcement officials with the necessary direction to know under what circumstances and to whom the "abortifacient warning" must be given. By conditioning criminal liability on such confusing and ambiguous criteria, §§ 2(10) and 11(d) present "serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights." *Colautti,* 439 U.S. at 394.

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relationship of §§ 2(10) and 11(d) with other provisions of the Abortion Law must be considered when analyzing their constitutionality. The district court found § 11(f) unconstitutionally vague. *Charles II,* 579 F. Supp. at 384. Plaintiffs consistently have urged that the Abortion Law is unconstitutionally vague. (*See, e.g.,* Joint Br. of Plaintiffs-Appellees filed in Seventh Circuit, Dec. 13, 1978.)

III. SECTION 6(1) CONDITIONS CRIMINAL LIABILITY ON VAGUE STANDARDS AND DOES NOT ASSURE PROTECTION OF THE WOMAN WHOSE HEALTH OR LIFE NECESSITATES THE PERFORMANCE OF A POST-VIABILITY ABORTION.

A. Because It Does Not Clearly Specify That The Attending Physician's Viability Determination Controls, § 6(1) Is Void For Vagueness.

Twice before in this decade, the Court has struck down as vague state criminal statutes that penalized physicians for failing to exercise a certain standard of care toward the fetus during an abortion. *Colautti*, 439 U.S. 379 (1979); *Danforth*, 428 U.S. 52 (1976).[35] These rulings dictate that § 6(1) be found unconstitutional as well.

Section 6(1) regulates post-viability abortions.[36] Its application, however, is not limited to those fetuses which the attending physician determines are viable. Section 6(1) also applies to fetuses which are "known to be viable" by persons other than the attending physician. Thus, § 6(1), contravenes *Colautti's* unequivocal holding that "'the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.'" *Charles IV*, 749 F.2d at 459, *citing Colautti*, 439 U.S. at 396.

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[35] Intervenor's contention that the court of appeals "adopted a standard of review that is far more hostile to state regulation of abortion after viability than any which has been adopted by this Court," (Int. Br. 36 n.22), disregards these decisions. The State is not required, as intervenor contends, "to legislate the parameters of medical judgment," *id.*, but it is required by these rulings to provide sufficient notice to physicians of what conduct will be considered criminal.

[36] Section 6(1) provides, in full:

> No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve

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Conceding that § 6(1) is unconstitutional if the attending physician's viability determination does not control, intervenor now argues that the attending physician's determination does control because § 6(1) is modified by the definition of viability in § 2(2). (Int. Br. 33-34, 47.) Intervenor's construction of § 6(1) is not supported by the history of the Abortion Law and is inconsistent with other provisions of that law, as amended by SB 47.

Prior to the enactment of SB 47, § 6(1) was construed as positing the determination of viability with the attending physician. *Wynn v. Scott*, 449 F. Supp. 1302, 1315 (N.D. Ill. 1978).[37] Following this decision, however, the General Assembly enacted SB 47, which amended § 6(1) by inserting the phrase "known to be," in front of the term "viable." Intervenor ignores this change and argues that § 6(1) means the same whether the phrase "known to be" appears in front of "viable" or not.

The second sentence of § 6(1) also employs the "known to be" phrase:

> Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such mea-

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> the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable, before or after birth, commits a Class 2 felony if the death of a viable fetus results from such failure.

Ill. Rev. Stat. ch. 38, ¶ 81-26(1) (1983). A Class 2 felony is punishable by imprisonment for "not less than 3 years and not more than 7 years. . . ." Ill. Rev. Stat. ch 38, ¶ 1005-8-1(a)(5) (1983).

[37] The statute construed in *Wynn* provided in part: "no person who performs or induces an abortion after the fetus *is viable*. . . ." (Emphasis added.)

> sures to encourage or to sustain the life of the fetus *known to be viable*, before or after birth, commits a Class 2 felony if the death of a viable fetus or infant results . . ..

(Emphasis added.) Intervenor compounds the ambiguity of the "known to be" phrase by arbitrarily assigning the phrase a different meaning in the second sentence. According to intervenor, the phrase "known to be viable," as applied to a physician, means the same as "viability," which is defined in § 2(2).[38] He argues, however, that that same phrase, as applied in § 6(1)'s second sentence to a person assisting a physician, means "that he or she knew that the attending physician had made a determination of viability . . .." (Int. Br. 24.) Intervenor's argument that "known to be viable" has one meaning for physicians and another for everyone else, makes the phrase superfluous as applied to physicians and ambiguous as applied to all others. His construction, advanced only for purposes of this litigation, violates "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti*, 439 U.S. at 392 (citation omitted).[39]

The mere possibility that a criminal standard of care might be invoked, even when the attending physician determines the fetus is not viable, "portends not an inconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center." *Colautti*, 439 U.S. at 391-92. The

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[38] When the General Assembly wanted the physician's subjective determination of viability to control, as it does in § 2(2), it incorporated express language to that effect. For example, in adopting SB 47, the legislature added § 6(4) to the law, which specifically incorporated the language of § 2(2), making it clear that the "possibility" of viability was to be determined according to the "medical judgment of the physician performing the pregnancy termination." Ill. Rev. Stat. ch. 38, ¶ 81-26(4) (1983).

[39] Intervenor's suggestion that the court of appeals erred in not adopting his construction of § 6(1) is frivolous. No limiting construction of § 6(1) was offered that court by the State. Certainly the State's adoption of intervenor's briefs in the court of appeals is not a sufficient or binding statutory construction. *Investment Co. Inst. v. Camp.*, 401 U.S. 617, 627-28 (1971).

ambiguity in § 6(1), no less than the fatal ambiguity in *Colautti*, chills the exercise of a woman's fundamental right. Thus, the Seventh Circuit correctly ruled it unconstitutionally vague under this Court's decisions in *Colautti* and *Danforth*. *Charles IV*, 749 F.2d at 460.

B. Section 6(1) Deprives A Woman Whose Life Or Health Necessitates A Post-Viability Abortion Of Her Fundamental Rights.

Intervenor recognizes that the woman's right to life and health must be preeminent in post-viability abortions. (Int. Br. 36, 47.) This preeminence has long been protected.[40] Indeed, even before *Roe*, states universally permitted abortions necessary to save the woman's life and health. *Roe*, 410 U.S. at 157 n.54. In defending §§ 6(1) and 6(4), intervenor relies on § 6(5) as the statutory enunciation of that preeminence. Section 6(5), however, weakens rather than strengthens intervenor's argument that these sections are valid.

Post-viability abortions are available only when necessary to preserve the woman's life or health. Ill. Rev. Stat. ch. 38, ¶ 81-25(1) (1983). Section 6(1) requires the physician performing a post-viability abortion to exercise "that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." Only the period of time "during the course of" the termination procedure is exempted, by § 6(5), from § 6(1)'s general command to do everything necessary to preserve fetal life.[41] Thus, any increased risk to the

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[40] Any conflict between the woman's health and the potential life of the fetus must be resolved in favor of the woman's health. *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 485 n.8, 501-02 (1983) ("*Ashcroft*"). *See also Colautti*, 439 U.S. at 400.

[41] Section 6(5), as contained in SB 47, specifically provides:

> Nothing in Section 6 requires a physician or any other

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woman does not control a physician's considerations when, prior to the "course of the termination" procedures, he or she selects the [abortion] technique to be used.[42]

The Illinois legislature enacted § 6(5) after § 6(1) had been interpreted to mean that a physician need not take any action, prior to, during, or after the pregnancy termination, that entailed a greater risk to the woman's health. *Wynn v. Scott*, 449 F. Supp. 1302, 1321 (N.D. Ill. 1978).[43] Rather than allow that broad interpretation, clearly necessary to avoid unconstitutionality, to stand, the legislature passed § 6(5) thereby restricting the impact of the court's ruling.[44]

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> person to employ any measures to encourage or to sustain the life of the fetus *during the course of a pregnancy termination* which, in the medical judgment of the physician *performing* the pregnancy termination based on the particular facts of the case before him, would increase the medical risk to the mother.

(Emphasis added.) That this version of § 6(5) is not intended to apply during the selection of technique process is emphasized by the new provisions of § 6(5), as amended by HB 1399. The new § 6(5) states in part that "[n]othing in Section 6 requires a physician to employ a *method of abortion* which . . . would increase medical risk to the mother." (Emphasis added.)

[42] As Justice Blackmun noted, "[t]he choice of method presumably will be made in advance" of the abortion procedure. *Ashcroft*, 462 U.S. at 500 (Blackmun, J., dissenting).

[43] In *Wynn*, the district court interpreted § 6(1) to mean that when a physician has a choice of procedure, both of equal risk to the woman, the physician must choose the procedure which is least fatal to the fetus. 449 F. Supp. at 1321. This interpretation of § 6(1), which was not made by the Illinois Supreme Court, is not binding on this Court or the State. *Simopolous v. Virginia*, 462 U.S. 506, 510 (1983); *Colautti*, 439 U.S. at 400.

[44] By citing *Wynn* in support of § 6(1), intervenor deliberately disregards SB 47's subsequent amendments to § 6, which added § 6(5) to the Abortion Law. *Wynn* was decided well before the legislature enacted SB 47 on October 30, 1979. 1 Final Legislative Synopsis and Digest of the 1979 Session of the Eighty-first General Assembly, State of Illinois 40-41 (1979).

The plain meaning of the phrase "during the course of" is reinforced by the fact that it is not used anywhere else in the statute. Had the legislature intended to have § 6(5) apply to selection of method, it would have phrased § 6(5) to so read.[45] By subordinating consideration of the woman's life or health when the technique is selected, § 6(1) impermissibly intrudes upon the physician-patient relationship and deprives the woman of the fundamental right to have her life and health be paramount during the entire post-viability abortion process. *Ashcroft*, 462 U.S. at 483-85; *Colautti*, 439 U.S. at 398-400.

Even during the termination process itself, § 6(5) does not adequately protect the woman's life or health. Contrary to intervenor's suggestion, § 6(5) does not make it clear that the physician must only "make use of available measures to preserve fetal life or health, provided such measures would pose no increased risk to maternal life or health." (Int. Br. 36.) Section 6(5) relieves a physician of the obligation to preserve fetal life or health *only* when such measure would increase "the medical risk" to the woman.

Nowhere in the Abortion Law is the term "medical risk" defined. To suggest, as does intervenor, that "medical risk" means "risk to the woman's life or health" is mere speculation.[46] Section 6(1), even as modified by § 6(5) during the actual abortion procedure, leaves "uncertain whether the stat-

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[45] The other case intervenor cites in support of his argument that § 6(5) modifies § 6(1) is no more persuasive than is *Wynn* or the statutory language. *Planned Parenthood of Kansas City v. Ashcroft*, 655 F.2d 848, 863-64 (8th Cir. 1981), is inappropriate because, unlike § 6(1), the Missouri statute at issue expressly required the physician to consider the life and health of the woman when choosing the abortion technique. 655 F.2d at 862 n.21.

[46] Intervenor's reliance upon *United States v. Vuitch*, 402 U.S. 62 (1971), to save the constitutionality of § 6(1) is misplaced. (Int. Br. 36.) The statute in *Vuitch* specifically used the term "health." Prior constructions of the term health made it clear that health included

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ute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival." *Colautti*, 439 U.S. at 400.

Had the General Assembly intended to use the phrase "increase the risk to the woman's life or health" in § 6(5), it knew how to do so. It specifically employed the phrase "necessary to save the life or health of the woman" in § 5(2) of the statute, which limits post-viability abortions to life or health threatening situations. By using the term "medical risk" instead, the General Assembly conveyed a different meaning.

1. **This section denies a woman of the medical care that she needs and advice upon which she can rely.**

As a pregnancy progresses, the risks of an abortion increase.[47] A post-viability abortion, performed only when necessary to save a woman's life or health,[48] demands a patient-

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both physical and mental health. Thus, this Court found that the statute was not unconstitutionally vague. 402 U.S. at 71-72. *See also Colautti*, 439 U.S. at 393-94. Here, there have been no interpretations of "medical risk" by the Illinois courts. Thus, intervenor's citation of *Vuitch* for the proposition that medical risk means "increased risk to the woman's life or health" is incorrect.

[47] Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterilization 158 (J.E. Hodgson ed. 1981); Centers for Disease Control, Dept. of Health and Human Services, *Abortion Surveillance 1979-1980* (1983).

[48] Health considerations that necessitate a post-viability abortion are often emergencies, *Ashcroft*, 462 U.S. at 485, and include: cardiovascular disease, cervical or ovarian cancer, pre-eclampsia, high blood pressure, kidney disease, and certain respiratory, urinary or neuromuscular disorders. *See generally* Romney, Gray, Little, Merrill, Quilligan & Standler, Gynecology & Obstetrics 703, 705-08, 710, 712-14, 718, 722, 724, 726, 729, 732, 739, 756, 762, 764, 776, 778, 783-84, 793, 795 (2d ed. 1981). *See also* J. Pritchard & P. MacDonald, Williams, Obstetrics 477 (17th ed. 1985).

physician relationship which promotes consultation and reliance upon the doctor's advice "in determining how any abortion [is] to be carried out." *Colautti*, 439 U.S. at 387. In regulating post-viability abortions, States may not limit a woman's right to receive her physician's best medical advice, nor deny the physician the discretion needed to effectuate the abortion decision. *Akron*, 462 U.S. at 429-30, 445; *Colautti*, 439 U.S. at 398-401.

Section 6(1) infringes on the rights of women needing post-viability abortions by establishing a standard of care which forces their doctors, under threat of criminal prosecution, to maximize efforts to preserve the fetus, no matter how futile.[49] By forcing the consideration of fetal interests at every stage of the medical care to be rendered — diagnosis, evaluation of risk, advising the patient, selecting the method, performing the procedure — § 6(1) diminishes the standard of care to which a woman is entitled, even if § 6(5) applies.

Operating under the threat of prosecution, a physician will be unlikely to provide care which is not, in some way, skewed

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[49] A study of late second trimester abortions (20-24 weeks) found that 3.4% of the prostaglandin induction abortions resulted in a live birth and 0.3% of saline abortions did. None of the fetuses survived. Robins & Surrago, *Alternatives in Midtrimester Abortion Induction*, 36 Obstet. & Gynecol. 716-20 (1980). *See also* notes 56, 57, *infra*.

Live births do not mean that viable infants are being born. For official statistical purposes 45 states, including Illinois, define "live birth" as a "product of conception, irrespective of the duration of the pregnancy which . . . breathes or shows any other evidence of life such as beating of the heart . . . or definite movement of voluntary muscles." National Office of Vital Statistics DHEW, *International Recommendations in Definitions of Live Birth and Fetal Death*, Washington, D.C. (1950), cited in Grimes, *Second Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260, 263 (1984) ("Grimes"). *See also*, Ill. Rev. Stat. ch. 111½, ¶ 73-1(5) (1983). Most live births are of premature fetuses which do not have the capacity for more than momentary survival. Grimes, *supra*, at 263-64.

contrary to the woman's interest. Worse, a woman receiving such care and advice may never know that considerations for the fetus, rather than for her own health, shaped this advice. Such a result robs a woman of the medical advice upon which she is entitled to rely. *Akron*, 462 U.S. at 427.

2. Intervenor falsely assumes that some methods present equal risk to the woman and to the fetus.

The assumption upon which intervenor rests his argument that § 6(1) creates no burden to the abortion right — that risks to the woman and to the fetus posed by various abortion procedures are objectively quantifiable—ignores the myriad of factors necessarily involved in the selection of the abortion method in any individual case. The confusion resulting from intervenor's myth of easy choices, coupled with the possibility of criminal penalties should the doctor's decision differ from that of those later reviewing his action, will chill physicians' participation in the implementation of a woman's right to obtain an abortion.

Current post-viability abortion techniques include dilatation and evacuations (D&E), intra-amniotic instillation of solutions containing saline, prostaglandin, urea, or some combination of those substances, prostaglandin E2 suppositories, oxytocin, or an eclectic mixture of several techniques.[50] No one

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[50] Romney, Gray, Little, Merrill, Quilligan & Standler, Gynecology & Obstetrics 841-43 (2d ed. 1981); Hern, *Serial Multiple Laminaria & Adjunctive Urea in Late Outpatient Dilitation & Evacuation*, 63 Obstet. & Gynecol. 543 (1984). *See also* Hern, Abortion Practice 22-23 (1984) (second trimester techniques). Because of the increased danger of death and major complications, hysterotomy and hysterectomy procedures are rarely used. *See, e.g.*, Hern, Abortion Practice 28 (1984); P. Diggery, *Hysterotomy and Hysterectomy as Abortion Techniques*, in Abortion And Sterilization: Medical and Social Aspects 331 (J. Hodgson ed. 1981); Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion And Sterilization: Medical and Social Aspects 161 (J. Hodgson ed. 1981).

abortion technique will be appropriate for all women. *Colautti*, 439 U.S. at 398-99. Rather, the decision must reflect the particularized medical problems which led to the woman's need for a post-viability abortion, as well as the many risks and contradictions known to be associated with each abortion technique.[51]

Into this already "complex medical judgment about which experts can — and do — disagree," *Collautti*, 439 U.S. at 401, intervenor would impose an obligation toward the fetus, although its interests may be diametrically opposed to those of the woman in need of the abortion.

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[51] It is generally recognized today that during the second trimester the safest procedure to ensure the woman's life and health, when properly performed, is the D&E, the very same procedure which results inevitably in fetal death. *Akron*, 462 U.S. at 436. *See also* Grimes, Schultz, Cates & Tyler, *Methods of Midtrimester Abortion: Which is Safest*, 15 Int. J. Gynaecol. Obstet. 184 (1977). Hypertension, asthma, glaucoma and epilepsy are all contraindications for prostaglandin abortions. Hern, Abortion Practice 125 (1984). Complications include severe respiratory and cardiovascular problems, chills, fever, coughing and shortness of breath. Other side effects include gastro-intestinal complications, nausea, vomiting and diarrhea. Kerenyi, *Intra-amniotic Techniques*, in Abortion And Sterilization: Medical and Social Aspects 368 (J. Hodgson ed. 1981) ("Kerenyi, *Intra-amniotic Techniques*"). For saline instillation abortions, contraindications include hypertension, sickle cell disease, anemia, heart disease, kidney disease and blood coagulopathy. Kerenyi, *Intra-amniotic Techniques, supra*, at 363-66; Kerenyi, *Hypertoxic Saline Instillation*, in G.S. Berger, et al., Second Trimester Abortions: Perspectives After A Decade's Experience 179 (1981); Niswander, Manual Of Obstetrics 22 (1980). Frequent complications from saline abortions include hemorrhage and infection, although hypernatremia is also reported. Kerenyi, *Intra-amniotic Techniques, supra*, at 363.

In light of the inherent subjectivity of this medically-based decision, the threat of criminal prosecution posed by § 6(1) is nothing more than "a trap for those who act in good faith." *Colautti*, 439 U.S. at 395 (citation omitted).

IV. SECTION 6(4) IS NOT SUPPORTED BY A COMPELLING STATE INTEREST IN FETAL LIFE OR WOMEN'S HEALTH AND IS THEREFORE UNCONSTITUTIONAL.

A. Because § 6(4) Severely Restricts Abortions Prior To Viability, It Is Unconstitutional.

Section 6(4) imposes the same unconstitutionally vague standard of care upon physicians and their assistants who perform abortions as does § 6(1).[52] Although intervenor's

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[52] Section 6(4) of the Abortion Law, as amended by SB 47 and HB 666, provides:

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of the mother, with or without artificial support. Any physician or person assisting in such pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such a failure.

Violation of § 6(4) is a Class 3 felony punishable by imprisonment for "not less than 2 years and not more than 5 years; . . ." Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(6) (1983). Because § 6(4)'s standard of care is the same as § 6(1)'s, § 6(4), like § 6(1), is unconstitutionally vague and chills the physician in the exercise of his medical judgment. *See* discussion *supra*, at 31-37.

argument is not clearly articulated, he apparently argues first that § 6(4) applies only at a time when the State's interest in fetal life is compelling (Int. Br. 44)—*i.e.*, viability—and second that if § 6(4) does apply at some previability stage, it is permissible because the State's interest, even if not compelling, is "at least very substantial." (Int. Br. 45.) Intervenor's argument resurrects the losing argument in *Colautti* in a disingenuous justification of the State's attempt to regulate abortion prior to viability. If "the doctrine of *stare decisis* . . . demands respect in a society governed by the rule of law," *Akron*, 462 U.S. at 419-20, the holding of *Colautti* dictates that intevenor's tired argument on § 6(4) once again be rejected.

In *Colautti*, this Court struck down a statute which did not clearly restrict its limitations to the post-viability phase of pregnancy. In reaching this decision, the Court rejected the argument that the phrase "is viable" had precisely the same meaning as did the term "may be viable." 439 U.S. at 392-93. Despite this clear holding, intervenor argues that § 6(1) and § 6(4) both are constitutional because both sections apply when the state has a compelling interest in fetal life. Intervenor's construction of § 6(4) ignores the differences between the express language of each section. Section 6(1), by its express terms, applies only at viability *i.e.*, "that stage of fetal development when . . . there is a reasonable likelihood of sustained survival . . . outside the womb. . . ." Ill. Rev. Stat. ch. 38, ¶ 81-22(2) (1983). By contrast, § 6(4), again by its express terms, applies whenever there is "a *possibility* . . . of sustained survival apart from the body of the mother. . . ." (Emphasis added.)

Intervenor asks this Court to construe § 6(4) so as to convert "a possibility" into a "reasonable likelihood" of sustained survival, a result contrary to the obvious semantical differences between these terms. To accept intervenor's construction would condition criminal liability on confusing criteria. Thus, § 6(4), like the confusing alternative "is viable" or "may be viable" standard struck down in *Colautti*, is unconstitutionally vague. 439 U.S. at 393.

Intervenor's further argument that § 6(4) is constitutional because its "possibility" standard is encompassed within the *Roe* definition of viability and therefore is more inclusive than the "conservative" definition of viability found in § 2(2) of the Abortion Law (Int. Br. 44), misreads *Roe* and its progeny. Section 2(2) defines viability in *exactly* the same language used by this Court in *Colautti*. *Compare Colautti*, 439 U.S. at 388, *with* Ill. Rev. Stat. ch. 38, ¶ 81-22(2) (1983). Thus, the definition in § 2(2) is no narrower than the definition of viability approved in *Roe*.[53]

Here, as in *Colautti*, the "crucial point" is that § 6(4)'s "possibility of sustained survival" and § 6(1)'s "reasonable likelihood of sustained survival" refer to distinct conditions in gestation. Thus, "one of these conditions differs in some indeterminate way from the definition of viability as set forth in *Roe* and in [Danforth.]" *Colautti*, 439 U.S. at 394. Pared to its most basic form, intervenor argues simply that the State should be permitted to circumscribe a woman's fundamental right of privacy prior to viability,[54] an argument consistently rejected by this Court. *Colautti*, 439 U.S. 392-93; *Danforth*, 428 U.S. at 82-84.[55]

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[53] In *Roe*, this Court found that a fetus is viable if it is "potentially" able to live outside the uterus. *Roe*, 410 U.S. at 160. Intervenor's attempt to equate § 6(4)'s "possibility" language with the express language of *Roe* is no more persuasive than his argument that "possible" means the same as "reasonable likelihood."

[54] Intervenor concedes as much in his Jurisdictional Statement. (Juris. St. at 52.)

[55] In *Danforth*, this Court struck down a Missouri statute, substantially the same as § 6(4), which imposed criminal penalties upon physicians performing abortions, even prior to viability, if said physician failed "to exercise that degree of professional, skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." *Danforth*, 428 U.S. at 85.

Evading this Court's express holdings, intervenor attempts to justify § 6(4) by citing medical statistics (Int. Br. 45-46) for the proposition that technology has resulted in viability determinations at an earlier gestational age than was the case in *Roe*. This recitation of medical statistics merely states the obvious. In *Roe*, this Court noted that although "[v]iability is usually placed at about seven months (28 weeks), [it] may occur earlier, even at 24 weeks." 410 U.S. at 160. Technological advances would, necessarily, affect the viability determination. *Id. See also Colautti*, 439 U.S. at 387. Despite the dissent's assertions in *Akron*,[56] accepted medical authorities, even those quoted by intervenor, agree that technological advancements simply have not occurred so as to enable the fetus to have "the capability of meaningful survival outside the mother's womb" at a much earlier time than the 24-week period suggested by this Court in *Roe*.[57] Worthington, *et al.*,

[56] The dissent's statement that it is "certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future," *Akron*, 462 U.S. at 457, is not supported by the medical literature cited for this proposition. For example, the dissent cites Philip, *et al.*, *Neonatal Mortality Risk for the Eighties: The Importance of Birth Weight/Gestational Age Groups*, 68 Pediatrics 122 (1981) for the proposition that infants "with a gestational age of 25 weeks and weight between 500 and 1,249 grams have a 20% chance of survival." The Philip data show that of 523 premature neonates treated in a regional intensive care unit between 1976-1979, only five were of 25 weeks gestational age or less. Two of those neonates weighed between 500-749 grams; both died. One weighed between 750 and 999 grams; it died. Two of the neonates weighed between 1,000 and 1,249 grams; only one survived. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1023 n.245 (1984) ("Law"). The other authority cited by the dissent likewise provides no support for viability during the first trimester of pregnancy. Law, 132 U. Pa. L. Rev. at 1023 n.245.

[57] Intervenor's contention that the survival rate now approaches 50% for neonates with a 24-week gestational age is not supported by either his chart or the underlying medical authorities. Intervenor first distorts the results of the case studies by failing to disclose that the

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Factors Influencing Survival and Morbidity With Very Low Birthweight Delivery, 62 Obstet. & Gynecol. 550, 555 (1983):

(*Footnote continued from preceding page.*)
survival rates apply *only* to neonates who were delivered "live born." The rates do not reflect those neonates delivered at a comparable gestational age who were still-borns. The results are further skewed by the fact that many of the case studies encompassed a select group of neonates, excluding some referrals and not treating those neonates who were not referred to regional centers. Gilstrap, et al., *Survival and Short Term Morbidity of the Premature Neonate*, 65 Obstet. & Gynecol. 37, 38 (1985).

Intervenor's medical data does not support his contention that, in recent years, 50% of neonates delivered at 24 weeks survive. (Int. Br. 45.) Starting with the Worthington study (source # 8 in intervenor's chart) which analyzed 185 "live births" in Wisconsin, neonates delivered at 24 weeks suffered a 100% *mortality* rate, as did neonates delivered at 23 weeks and 22 weeks. Worthington, *et al., Factors Influencing Survival and Morbidity With Very Low Birthweight Delivery*, 62 Obstet. & Gynecol. 550, 551 (1983). This is a far cry from the 50% survival rate claimed by intervenor. Similarly, the Milner and Beard study (source # 12) reports a 16% survival rate among 24 week neonates, not a 50% rate. Milner & Beard, *Limits of Fetal Viability*, 1984 LANCET 1079. This report was based on a survey of 31 neonatal care units in the United Kingdom, many of which used different definitions of viability and for gestational age. *Id.*

The Gilstrap study (source #13) is the only one of the thirteen sources cited by intervenor which provides any support for his claimed survival rate. During the five year study period, only six neonates at 24 weeks were live born and treated. Of those six, only 3 survived. Gilstrap, *et al., Survival and Short Term Morbidity of the Premature Neonate*, 65 OBSTET. & GYNECOL. 37, 38 (1985). Thus, intervenor bases his claimed 50% survival rate on three neonates. The distortion of reaching intervenor's conclusion based on these data is illustrated by the report in the same study that, of seven infants born alive one week older in gestational age, only two survived. The authors compute an overall survival rate of 39% through the 26th week; of those survivors, one third suffered moderate to severe damage.

(*Footnote continued on following page.*)

Koops *et al; Neonatal Mortality Risk in Relation to Birth Weight and Gestational Age Update*, 101 J. Pediatrics 969, 972 (1982). *See also* Goldenberg *et al., Neonatal Mortality in Infants Born Weighing 501-1,000 Grams*, 151 Am. J. Obstet. Gynecol. 609, 609 (1985).

The flexibility necessarily afforded physicians allows them to take into consideration developments in technology and medical skill when making a viability determination.

B. Section 6(4)'s Standard Of Care Provision Unconstitutionally Interferes With The Woman's Exercise Of Her Fundamental Right.

Repeating his analysis of § 6(1), intervenor argues that § 6(4) does not burden the woman's right to terminate her pregnancy, because it does not forbid abortions. (Int. Br. 39-43.) As with § 6(1), that argument ignores the fact that this fundamental right has two components: making the decision and then implementing it. *Akron*, 462 U.S. at 427.

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Intervenor's survival chart based on birth weight is equally misleading. He deliberately aggregated separate categories of birth weight to suggest a higher rate of survival at lower birth weights, thereby implying that fetuses survive at much younger gestational ages than previously thought. For example, intervenor reports a 24% survival rate for neonates in the 500-800 gram range in the Kraybill study (source # 6). Rather than report the survival rates for the individual weight ranges selected by the researchers as significant, he aggregates three previously separate ranges to secure a statistic more suggestive of survival at an earlier gestational age. Broken down precisely according to the researchers' categories, the survival rates plummet in the lower birth weights. For the neonates weighing between 501-600 grams, there was a 100% mortality rate. For neonates weighing between 601-700 grams, there was a 83% mortality rate. Only for neonates weighing between 701-800 grams was there a significant survival rate — 62%. Kraybill, et al., *Infants With Birthweights Less than 1,000 g: Survival, Growth and Development*, 138 Am. J. Diseases Children 837, 840 (1984).

Section 6(4) patently interferes with a woman's right, in consultation with her physician, to obtain an abortion most protective of her life and health. Like § 6(1), § 6(4) does not allow a physician to make the woman the focal point of medical decision-making. Rather, consideration of the fetus — even though it is a fetus with only a "possibility" of survival — is interjected in the physician's decision-making. See 31-37, *supra*. Moreover, the vagueness of the statutory duties imposed by § 6(4), coupled with the virtual impossibility of determining when "a possibility of viability exists, will have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment." *Colautti*, 439 U.S. at 396.

> As the court of appeals correctly stated:
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> [T]he State's interest in preserving fetal life, becomes compelling only at the stage of viability. *Roe v. Wade*, 410 U.S. at 163, 93 S. Ct. at 731. As a consequence, the State's interest in preserving fetal life cannot justify section 6(4) because section 6(4) applies to certain pre-viability abortions. . . . Because the State has advanced no other compelling interest which could justify section 6(4)'s restriction on a woman's freedom to choose an abortion, this Court must find that section 6(4) unconstitutionally infringes on the woman's fundamental right. Section 6(4) is therefore invalid.

Charles IV at 461. This holding, which was dictated by *Danforth*, 428 U.S. at 82-84, and *Colautti*, 439 U.S. at 386-87 n.7, must be affirmed.

V. THE CONSTITUTIONALITY OF AMENDED §§ 6(1) AND 6(4) IS NOT PROPERLY BEFORE THIS COURT.

Intervenor seeks original review in this Court of the constitutionality of HB 1399's amendments to §§ 6(1) and 6(4). This position is contrary to the position advanced by intervenor in the court of appeals and contrary to the legal authority he cites.

Intervenor advised the court of appeals, that amended §§ 6(1) and 6(4) were under review in *Keith v. Daley*, No. 84

C 5602 (N.D. Ill. 1984). This was especially appropriate for amended § 6(4), he told the court of appeals, because of the need to establish "an adequate factual record. . . ." (Suppl. Br. at 6.) Similarly, intervenor characterized amended § 6(1) as "substantially different from the old [§ 6(1)]," and amended § 6(4) as "present[ing] different questions than did the old language." (Suppl. Br. at 3, 6.)

By way of contrast, intervenor now asserts that the amended statutes present only questions of law. (Int. Br. 26). Intervenor then asks this Court to review these amended statutes as an original matter, but cites no case in which this Court has evaluated a materially different superseding statute enacted during the pendency of a constitutional challenge. Indeed, in *Fusari v. Steinberg*, 419 U.S. 379 (1975), one of the cases upon which intervenor relies, the Court specifically declined to evaluate the constitutionality of a superseding statute as an original matter.[58]

This is not a case, like each of those cited by intervenor, in which the change of law took place only after the court appealed from had entered judgment. Intervenor spurned a possible opportunity in the court of appeals to seek review of amended §§ 6(1) and 6(4). His change of litigation tactics is no occasion for departing from this Court's well-settled rule that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see also Brandon v. Holt*, 105 S. Ct. 873, 879 n.25 (1985).

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[58] There was no discussion of the constitutionality of the superseding statutes in either of intervenor's principal cases, *Brockington v. Rhodes*, 396 U.S. 41 (1969), and *Hall v. Beals*, 396 U.S. 45 (1969). In *Schall v. Martin*, 104 S. Ct. 2403, 2405 n.2 (1984), the Court evaluated the constitutionality of the superseding statute only insofar as it was "identical to [the] former" statute. Finally, the Court in *Allee v. Medrane*, 416 U.S. 802, 818 (1974), pointedly observed that "any challenge to the new provisions presents a different case."

VI. THIS CASE IS NOT MOOT: THE AMENDMENTS TO THE CHALLENGED STATUTE MERELY CONSTITUTE A VOLUNTARY, NON-BINDING, CESSATION OF IMPERMISSIBLE CONDUCT.

The defendant alleging mootness carries a heavy burden of persuasion. *See United States v. Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203 (1968). Mootness results when, during the pendency of a lawsuit, events occur which make it impossible for a court to render a judgment affecting the rights of the litigants. *DeFunis v. Odegaard,* 416 U.S. 312, 316 (1976). A defendant's voluntary cessation of a challenged practice, however, does not moot the case or deprive a federal court of its power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982) ("Mesquite"). If, as here, abandonment seems timed to anticipate suit, this Court has warned of a special need to be wary of efforts to defeat injunctive relief by protestations of repentance and reform. *United States v. W.T. Grant Co.,* 345 U.S. 629, 632 n.5 (1953).

Intervenor concedes that in cases involving voluntary cessation of illegal conduct, mootness will be found only when "it can be said with assurance" that (1) no reasonable expectation exists that the violation will recur; and (2) the effects of the alleged violation have been completely and irrevocably eradicated. (Int. Br. 27.) *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979). *See also Mesquite,* 455 U.S. at 289 n.10. As recognized by the court of appeals, intervenor established neither criterion with respect to either §§ 6(4) or 6(1).

A. The Appeal With Respect To Old § 6(4) Is Not Moot.

1. The latest amendments to § 6(4) evidence a continuing violation of the Constitution.

Intervenor cannot evade the first prong of the *Davis/Mesquite* test for mootness. Amended § 6(4) retains a

pre-viability standard very similar to that held unconstitutional. Repetition of this unconstitional standard is overt evidence of a recurring violation of the Constitution.[59] Intervenor's failure to establish the first prong of the *Mesquite/Davis* standard is sufficient to defeat his mootness argument.[60]

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[59] Intervenor rewrites this history as "a good faith attempt by the legislature to conform its laws to the holdings of this Court." (Int. Br. 28.) To support this characterization, intervenor quotes the court of appeals, out of context, as "acknowledging" that " 'the State has attempted repeatedly to alter the contours of [the Illinois Abortion Law] to reflect the latest judicial pronouncements in the area of abortion and privacy.' " (Int. Br. 27-28, *quoting Charles IV*, 749 F.2d at 458.) In fact, the court of appeals reached a contrary conclusion.

Intimately familiar with the number of amendments and consequent challenges to the Illinois Abortion Law of 1975, the court of appeals stated, in context:

> Like the defendant city in Aladdin's Castle, the State of Illinois could re-enact S.B. 47's version of Section 6(4) if this court dismissed plaintiffs' challenge to that section. Indeed, the very number of amendments made to the challenged statute in the last several years persuades this court that such a result would not be unlikely. Moreover, the history of the Abortion Law suggests that the State has attempted repeatedly to alter the contours of that statute to reflect the latest judicial pronouncements in the area of abortion and privacy. As a result, defendants and intervening defendants have failed to prove to this court that the State will not "return to its old ways" if the court dismisses plaintiffs' claim.

Charles IV, 749 F.2d at 458.

[60] Intervenor offers two bases for concluding that the State is unlikely to re-enact former § 6(1) and § 6(4), neither of which is persuasive. First, intervenor asserts that "the [Illinois] General Assembly, in the context of abortion regulation, has never repealed a challenged provision and subsequently re-enacted that same provision at a later date." (Int. Br. 28). This assertion is incorrect. As noted in the Statement of the Case, *supra*, at p. 3 & n.2, new §§ 2(7) and

(Footnote continued on following page.)

2. **The unconstitutional effects of the old § 6(4) are not eradicated.**

Intervenor also fails to comply with the second requirement of the *Mesquite/Davis* test. The HB 1399 amendments neither correct the constitutional inadequacies of § 6(4) nor eradicate its harmful chilling effects. The old § 6(4) was flawed because the State unconstitutionally attempted to regulate the abortion process, on behalf of the fetus, prior to viability. By merely inserting the word "reasonable" before "possibility," the new § 6(4) continues to impose criminal liability on physicians who fail to act on behalf of a pre-viable fetus, in contravention of prior holdings of this Court. *Colautti*, 439 U.S. 379 (1979).[61]

(Footnote continued from preceding page.)
11(3) are verbatim reenactments of former, challenged §§ 2(10) and 11(d).

Intervenor also contends the enactment of § 6(2) makes it unlikely that the General Assembly would re-enact former §§ 6(1) and 6(4) because "the language of unamended §§ 6(1) and 6(4) is inconsistent with § 6(2)." (Int. Br. 28.) It is by no means clear to what extent former §§ 6(1) and 6(4) would require the presence of a second physician. Accordingly, the very vagueness which is one basis for challenging these provisions makes it impossible to determine whether they are inconsistent with one another.

[61] Despite his claim that HB 1399 rendered this case moot, intervenor never attempted to dismiss the appeal. Instead, intervenor continued to urge the Seventh Circuit to reverse the district court's injunction. Intervenor's continued advocacy is significant. In *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944), the Court declined to treat as moot an action under the Fair Labor Standards Act even after the defendant employer voluntarily had changed its method of paying employees. This Court observed that defendant "has consistently urged the validity of the [old] plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made."

B. **Plaintiff-physicians Remain At Risk Under unamended § 6(1).**

Section 6(1), no less than § 6(4), has been subject to continuous amendment by the General Assembly in response to successful constitutional challenges. Intervenor thus cannot satisfy the first prong of the *Mesquite/Davis* test. The live nature of the constitutional controversy surrounding § 6(1) provided, however, an additional reason for the court of appeals to reach the merits. Old § 6(1) remained in effect from October 14, 1983, until June 30, 1984, the day HB 1399 was enacted. Violation of the old § 6(1) was a Class 2 felony if the death of a fetus occurred as a result of a post-viability abortion. Ill. Rev. Stat. ch. 38, ¶ 81-26(1) (1983). The relevant statute of limitations, Ill. Rev. Stat. ch. 38, ¶ 3-5(b) (1983), allows the State a period of three years within which to commence prosecution.[62] As noted by the court of appeals, this risk of prosecution was "insufficiently speculative" to render moot the appeal on § 6(1). *Charles IV*, 749 F.2d at 457.[63]

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[62] Intervenor relies on this Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), in an attempt to shift the burden to appellees to prove that the risk of prosecution is both " 'real and 'immediate.' " (Int. Br. 29, *quoting Lyons, supra*, 461 U.S. at 102.) *Lyons* is wholly inapposite. *Lyons* set forth the burden of proof on the Article III "case or controversy" requirement, not mootness. As noted, *supra* at 46, the burden of proving the "eradication of past effects" prong of mootness rests squarely and heavily with the proponent of mootness.

[63] Intervenor's representation that no one was prosecuted under § 6(1) and that no prosecutions presently are pending must be received with skepticism. Intervenor cites no support for this claim and does not represent the defendant class of State's Attorneys who are charged with the enforcement of this statute throughout Illinois' 102 counties.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Seventh Circuit. In the alternative, this Court should dismiss intervenor's appeal for lack of a justiciable case or controversy under Article III.

Respectfully submitted,

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** Appellees wish to acknowledge the assistance of Brett Rappaport, a law student at John Marshall School of Law, in the preparation of this brief.

Dated: September 6, 1985

SUPPLEMENTAL APPENDIX

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

ALLAN G. CHARLES, M.D., MARVIN ROSNER, M.D., DAVID ZBARAZ, M.D., and MARTIN MOTEW, M.D., and on behalf of all other similarly situated,

Plaintiffs,

v.

BERNARD CAREY, State's Attorney for the County of Cook, WILLIAM J. SCOTT, Attorney General of the State of Illinois, their agents, successors, and all others similarly situated, and BYRON FRANCIS, M.D., Acting Director of Public Health, State of Illinois,

Defendants.

79 C 4541

THE HOPE CLINIC FOR WOMEN, LTD., an Illinois corporation, HECTOR N. ZEVALLOS, M.D., NATIONAL HEALTH CARE SERVICES OF PEORIA, INC., an Illinois corporation, ARTHUR C. WATSON, JR., M.D., and ROBERT C. STEPTOE, M.D.,

Plaintiffs,

v.

WILLIAM J. SCOTT, Attorney General of the State of Illinois, and BERNARD CAREY, State's Attorney of Cook County, Illinois,

Defendants.

79 C 4548

MOTION TO INTERVENE AND PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM

NOW COME Eugene F. Diamond, M.D., Jasper F. Williams, M.D., and Mr. David J. Campbell, pursuant to Federal

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This document has been reproduced in the same form as it was filed.

Rules of Civil Procedure 24 and 17, to move this Court, Judge Joel M. Flaum presiding, to intervene and for appointment of guardian ad litem in this named action to defend rights and interests acknowledged by the Illinois "Abortion Law of 1975," as amended by Illinois Senate Bill 47 (the "Law").

1. In support of his Motion and Petition, Dr. Eugene F. Diamond states unto this Court as follows:

a) Dr. Diamond is a board-certified pediatrician registered and liscensed as a physician and surgeon in the State of Illinois. He is Professor of Pediatric Medicine at Stritch School of Medicine; he practices at 11055 S. St. Louis, Chicago, Illinois; he resides in Palos Park, Illinois. *See* affidavit here attached as Exhibit A; *curriculum vitae* here attached as Exhibit B.

b) In the usual and customary practice of his profession, Dr. Diamond cares for children recently born; at present he supervises the care of ten such infants. Dr. Diamond was appointed guardian *ad litem* for infants who survive abortion in *Wynn v. Scott*, 449 F.Supp. 1302 (N.D. Ill., three judge court, 1978), *aff'd sub nom., Wynn v. Carey,* 599 F.2d 193 (7th Cir. 1979), ("*Wynn I*"), prior litigation concerning the unamended "Illinois Abortion Law of 1975," Ill. Rev. Stat. ch. 38 § 81-21 *et seq.* (1977).

c) Dr. Diamond is the parent of an unemancipated minor daughter of childbearing age. As Dr. Diamond here proposes, he likewise intervened in *Wynn I* and in *Wynn v. Scott,* 448 F.Supp. 997 (N.D. Ill. 1978), *aff'd sub nom. Wynn v. Carey,* 582 F.2d 1375 (7th Cir. 1978), ("*Wynn II*"), to support the claims, interests and defenses acknowledged on behalf of parents of minors by the "Illinois Abortion Law of 1975," unamended, and the "Illinois Parental Consent to Abortion Law of 1977" [Ill. Rev. Stat. ch.38 § 81-51 *et seq.*

(1977 Supp.)], and to defend his fundamental rights and interests as a parent to nurture, care for and guide his minor daughter. See *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Ginsberg v. New York,* 390 U.S. 629 (1968); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923). In addition to *Wynn I* and *Wynn II,* parents have elsewhere intervened in abortion cases to defend their interests and the interests of their minor daughters. *Bellotti v. Baird,* 393 F.Supp. 847 (D. Mass. 1975); *Planned Parenthood of Memphis v. Blanton,* C-78-2310 (D.W. Tenn., filed June 29, 1978); *Women's Community Health Center v. Cohen,* Civ. No. 79-1628 (D. Maine, filed July 31, 1979); *Akron Center for Reproductive Health, Inc.* v. City of Akron, Civ. Action C78-155A (N.D. Ohio, opinion filed Aug. 22, 1979); *Womens Services v. Thone,* CV79-L-85 (D. Neb., order filed April 20, 1979). As father to his daughter, Dr. Diamond acts and maintains an interest in her welfare should she consider or elect to procure an abortion.

d) Dr. Diamond conscientiously objects to performing or assisting in the performance of abortion. He has intervened in litigation to protect his professional interest in statutory restrictions on abortion. See *Zbaraz v. Quern,* No. 77 C 4522 (N.D. Ill., filed Dec. 21, 1977), (order granting preliminary injunction), rev'd, 572 F.2d 582 (7th Cir. 1978); *Zbaraz v. Quern,* 469 F.Supp. 1212 (N.D. Ill. 1979), *appeal docketed;* No. 79-64 (U.S. Sup. Ct. July 13, 1979); *stay denied, Williams v. Zbaraz,* 99 S. Ct. 2095 (1979).

e) Dr. Diamond moves to intervene as a party defendant in this action as a parent of an unemancipated minor daughter of childbearing age, and asserts the follow-

ing interests, claims, and defenses acknowledged by the Law:

i) § 1 acknowledges an interest of the parent of unemancipated minor daughters of childbearing age, in maternal health, and in the integrity of the maternal decision-making process;

ii) § 3.3 provides that the parent be notified and have the opportunity to consult on an informed basis with his minor unemancipated daughter prior to performance of abortion upon her;

iii) § 3.1 assures that abortion would be performed by a physician and that the minor would have an opportunity to privately consult with her physician prior to performance;

iv) §§ 3.2, 3.5, 6(6), 11(c) and 11(d) assure that certain information essential to the minor's decision-making processes should be made available, that a reasonable period of time to consider such information is to be provided, and that the minor should be secure from coercion and undue influence to procure abortion, thereby protecting and assuring the fundamental right to decide whether or *not* to terminate pregnancy, *Roe v. Wade*, 410 U.S. 113, 153 (1973); and

v) §§ 5, 9, 11(f) and 12 protect an interest in preserving maternal life and health by providing that abortions should be performed in hospitals after the first trimester of pregnancy, by limiting the use of saline amniocentesis, by proscribing unnecessary surgery, and by requiring that the minor be informed of subsequent complications.

f) Dr. Diamond petitions this Court to appoint him guardian ad litem for infants who survive abortion in

order to defend the following rights and interests acknowledged on their behalf by the Law:

i) § 1 recognized the infant's interest in life and health;

ii) § 4 provides for life support should an infant survive abortion;

iii) § 6 in its various parts and § 12 provide standards of care for an infant who survives an abortion and for enforcement of such standards; and

iv) §§ 7 and 8 provide judicial standards and procedures to assure that the best interests of infants who survive abortion will be served.

g) Dr. Diamond moves this Court to intervene as a party defendant in this named action on behalf of himself as a practicing physician, and asserts the following professional interests, claims, and defenses acknowledged by the Law:

i) § 13 provides that Dr. Diamond, who conscientiously objects to performing or assisting in abortion, cannot be held criminally, professionally, administratively, or civilly liable for failure to perform or assist in abortion;

ii) §§ 11(a) designates that the requirements of the Law should be the standards for professional conduct relating to abortion; Dr. Diamond agrees that the requirements set forth by the Law are appropriate to the medical profession, and asserts an interest in the entire law to uphold standards appropriate to the medical profession and his specialty; and

iii) To the extent that the operative effect of the Law in its entirety and through each of its provisions

would permit or encourage fewer abortions to be performed, as the plaintiffs allege it would, *e.g.* Charles Complaint at para. 26, Dr. Diamond, maintains a fiscal interest in the outcome of this litigation since he would receive consideration for his services rendered to such children who are not aborted and become his actual or potential patients upon live birth.

2. In support of his Motion and Petition, Dr. Jasper F. Williams states unto this Court as follows:

a) Dr. Williams is a board certified obstetrician and gynecologist licensed as a physician and surgeon in the State of Illinois. He is past president of the National Medical Association. He practices at 408 E. Marquette, Chicago, Illinois; he resides in Chicago, Illinois. *See* affidavit here attached as Exhibit C; *curriculum vitae* here attached as Exhibit D.

b) In the usual and customary course of his practice, Dr. Williams treats the human being *in utero* as an individual patient, which is the usual and customary practice of the medical profession. *See* J.P. GREENHILL & E.A. FRIEDMAN, BIOLOGICAL PRINCIPLES AND THE MODERN PRACTICE OF OBSTETRICS 2-4 (1974); TEN TEACHERS UNDER THE DIRECTION OF STANLEY G. CLAYTON, *Ante-Natal Care,* in OBSTETRICS (11 ed. 1966); K.R. NISWANDER, Preface, in OBSTETRICS; ESSENTIALS OF CLINICAL PRACTICE (1st ed. 1976); A. LILEY, The Foetus in Control of His Environment, in ABORTION AND SOCIAL JUSTICE (1973). Dr. Williams presently supervises the care and treatment of approximately 125 such patients. It is well established that physicians may assert the rights and interests of their patients where such rights or interests might not otherwise be as-

serted. *Singleton v. Wulff,* 428 U.S. 106 (1976); *Friendship Medical Center v. Chicago Board of Health,* 505 F. 2d 1141 (7th Cir. 1974); *Wynn v. Scott,* 449 F.Supp. 1302 (N.D. Ill., three judge court, 1978). Guardians have been appointed to defend the interests of unborn children in federal courts during the course of abortion-related litigation, including *Wynn I,* prior litigation concerning the "Illinois Abortion Law of 1975," unamended. See *Wynn v. Scott,* 449 F.Supp. 1302 (N.D. Ill., three judge court, 1976); *Doe v. Scott,* 321 F.Supp. 1385 (N.D. Ill., three judge court, 1971); *McRae v. Mathews,* 421 F.Supp. 533 (E.D. N.Y. 1976); *Klein v. Nassau County Medical Center,* 347 F.Supp. 496 (E.D. N.Y. 1972); *Planned Parenthood of Memphis v. Blanton,* C-78-2310 (D. W. Tenn., filed June 29, 1978). *See also* Wright & Miller, 6 *Federal Practice and Procedure* 776 (West 1971); *Hatch v. Riggs National Bank,* 361 F.2d 559 (D.C. Cir. 1966); *Hatch v. Riggs National Bank,* 284 F.Supp. 396 (D. D.C. 1968); *Doe v. Doe,* 314 N.E.2d 128 (Mass. S.J.C. 1974).

c) Dr. Williams conscientiously objects to performing or assisting in the performance of abortion. He has intervened in litigation to protect his professional interest in statutory restrictions on abortion. *Zbaraz v. Quern,* No. 77 C 4522 (N.D. Ill., filed Dec. 21, 1977) (order granting preliminary injunction), *rev'd,* 572 F.2d 582 (7th Cir. 1978); *Zbaraz v. Quern,* 469 F.Supp. 1212 (N.D. Ill. 1979) *appeal docketed,* No. 79-64 (U.S. Sup. Ct. July 13, 1979), *stay denied, Williams v. Zbaraz,* 99 S.Ct. 2095 (1979).

d) Dr. Williams moves to intervene as party defendant in this named action to defend the rights and interests of his prenatal patients, or, in the alternative, petitions this court to appoint him guardian ad litem for unborn

children in this named action, and asserts the following interests, claims and defenses acknowledged on their behalf by the law:

1) § 1 acknowledges a fetal interest in continued existence; and

ii) §§ 5 and 6 assure that the fetus will not be aborted or placed at risk except under certain circumstances and under certain conditions.

e) Dr. Williams moves this Court to intervene as a party defendant in this named action on behalf of himself as a practicing physician, and asserts the following interests, claims and defenses acknowledged by the Law:

i) § 13 provides that Dr. Williams, who does not perform or assist in abortions based upon his conscientious objection to this practice, cannot be held criminally, professionally, administratively, or civilly liable for failure to perform or assist in the performance of abortion;

ii) § 11(a) designates that the requirements of the Law are the standards for professional conduct relating to abortion; Dr. Williams agrees that the requirements of the Law are appropriate to his profession, and asserts an interest in the entire Law to uphold standards appropriate to his profession and speciality;

(iii) To the extent that the operative effect of the Law in its entirety and through each of its provisions would permit or encourage fewer of actual and potential female patients to abort their actual and potential patients *in utero*, as the plaintiffs allege it would, *e.g.* Charles Complaint at para. 26, Dr. Williams maintains a fiscal interest in the outcome of this litigation since he does not perform abortion, but receives consideration for services relating to care of female patients and patients *in*

utero during pregnancy and upon normal delivery; and

iv) § 10 and those sections of the Law under which § 10 is operative, and §§ 11(b) and 11(e), which require that certain information be reported to the State then made available to researchers in statistical form, would assist Dr. Williams in the practice of his profession by providing data upon which he could base medical judgments and offer professional advice to benefit patients, and which would form standards for practice of the medical profession and Dr. Williams' specialty.

3. In support of his Motion, Mr. Campbell states unto this Court as follows:

a) Mr. Campbell attends Garrett Evangelical-Theological Seminary of Northwestern University, Evanston, Illinois, where he is a candidate for a degree of Master of Divinity in preparation for ministry in the United Methodist Church. He resides with his wife in Evanston, Illinois. *See* affidavit here attached as Exhibit E.

b) Mr. Campbell is married; his marriage is not subject to a decree of separate maintenance. As Mr. Campbell here proposes, a spouse likewise intervened in *Wynn I* to support interests, claims, and defenses acknowledged by the "Illinois Abortion Law of 1975," unamended, and to defend fundamental procreative and associational rights which attach to the marital relation. *Loving v. Virginia,* 388 U.S. 1 (1967); *Estin v. Estin,* 134 U.S. 541 (1948); *Skinner v. State of Oklahoma,* 316 U.S. 535 (1942); *Maynard v. Hill,* 125 U.S. 190 (1888).

c) Mr. Campbell moves to intervene as a party defendant in this named action as a spouse of a woman of

childbearing age, and asserts the following interests, claims and defenses acknowledged by the Law:

i) § 1 acknowledges spousal and paternal interests in children conceived of marriage; and

ii) §§ 3.3 provides that the husband is to be notified and have an opportunity to consult on an informed basis with the wife prior to performance of abortion upon her.

4. Pursuant to Federal Rule of Civil Procedure 24(a)(2), Dr. Diamond, Dr. Williams, and Mr. Campbell possess interests relating to the subject matter of this litigation. Adverse disposition of this case would, as a practical matter, impede and impair their ability to protect private rights and interests acknowledged on their behalf by the Law. Their interests are not adequately represented by the present parties to this action: they assert private rights and interests independent from the interests of the State; moreover, one of the named defendants has clearly opposed this legislation (see Exhibits F and G, here attached).

5. Pursuant to Fed. R. Civ. P. 24(b)(2), Dr. Diamond, Dr. Williams and Mr. Campbell claim numerous questions of law and fact in common with the main subject matter of this action. Their application is timely and they warrant that their participation in this litigation will not unduly delay or prejudice the original parties. Their Motion includes and is accompanied by pleadings setting forth claims and defenses.

6. The applicants will be jointly represented by the same counsel; all briefs and pleadings will be jointly filed. Therefore, their intervention would be consistent with the need for judicial economy.

WHEREFORE, Dr. Diamond prays this Court to permit him to intervene and to participate as party defendant in this action in the following capacities:

1. As parent of a minor unemancipated daughter of childbearing age;

2. As guardian ad litem for infants who survive abortions; and

3. As a practicing physician with professional interests at stake in the outcome of this litigation.

Dr. Williams prays this Court to permit him to intervene and to participate as party defendant in this action in the following capacities:

1. As a physician asserting the rights and interests of his prenatal patients, or, in the alternative, as guardian ad litem for unborn children subject to abortion; and

2. As a practicing physician with professional interests at stake in the outcome of this litigation.

Mr. Campbell prays this Court to permit him to intervene and to participate in this action as a party defendant as the spouse of a woman of childbearing age.

Respectfully submitted,

EUGENE F. DIAMOND, M.D.
JASPER F. WILLIAMS, M.D.
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ABORTIONS

PUBLIC ACT 83-1128

HOUSE BILL 1399

AN ACT in relation to abortions and amending certain Acts herein named.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sections 2, 3.1, 5, 6, 10, 11, 12 and 14 of the "Illinois Abortion Law of 1975", veto overridden November 20, 1975, as amended, are amended to read as follows:

(Ch. 38, par. 81-22) [S.H.A. ch. 38, ¶ 81-22]

Sec. 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this Law shall be given the meaning ascribed to them:

~~(1) "First trimester" means the first twelve weeks of gestation commencing with ovulation rather than computed on the basis of the menstrual cycle.~~

(1) ~~(2)~~ "Viability" means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.

(2) ~~(3)~~ "Physician" means any person licensed to practice medicine in all its branches under the Illinois "Medical Practice Act", approved June 30, 1923, as amended.[1]

Additions in text are indicated by underline; deletions by ~~strikeouts~~

[1] Chapter 111, ¶ 4401 et seq.

~~(4) "Hospital" means a hospital licensed pursuant to the Illinois "Hospital Licensing Act", approved July 1, 1953, as amended.~~

(3) ~~(5)~~ "Department" means the Department of Public Health, State of Illinois.

(4) ~~(6)~~ "Abortion" means the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus ~~intent to cause fetal death~~.

(5) ~~(7)~~ "Fertilization" and "conception" each mean the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the cell ~~vitelline~~ membrane of the ovum.

~~(8) "Human being" means the individual from fertilization until death.~~

(6) ~~(9)~~ "Fetus" and "unborn child" each mean an individual organism of the species homo sapiens ~~a human being~~ from fertilization until live birth.

(7) (10) "Abortifacient" means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.

(8) "Born alive", "live born", and "live birth", when applied to an individual organism of the species homo sapiens, each mean he or she was completely expelled or extracted from his or her mother and after such separation breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, irrespective of the duration of pregnancy and whether or not the umbilical cord has been cut or the placenta is attached.

(Ch. 38, par. 81-23.1) [S.H.A., ch. 38, ¶ 81-23.1]

Sec. 3.1. ~~(A)~~ Medical Judgment. No abortion shall be performed except by a physician after either (a) he determines that, in his best clinical judgment, the abortion is necessary, or (b) he receives a written statement or oral communication by another physician, hereinafter called the "referring physician", certifying that in the referring physician's best clinical judgment the abortion is necessary. Any person who intentionally or knowingly performs an abortion contrary to the requirements of Section 3.1 ~~this paragraph (A)~~ commits a Class 2 felony.

~~(B) Medical Consultation.~~

~~(1) No abortion shall be performed except in compliance with regulations which the Department shall issue to assure.~~

~~(a) That, before the abortion is performed, the woman upon whom the abortion is to be performed will have a private medical consultation with the physician who is to perform the abortion, that the consultation will be in a place, at a time and of a duration reasonably sufficient to enable the physician to determine whether, based upon his best clinical judgment, the abortion is necessary, and~~

~~(b) That the physician who is to perform the abortion will describe the basis of his best clinical judgment that the abortion is necessary on a form prescribed by the Department as required by Section 10 of this Law.~~

~~(2) Exception. Subsection (B) (1) (a) of Section 3.1 shall not apply when, in the medical judgment of the attending physician based on the particular facts of the case before him, there exists a medical emergency in such a case, the physician shall describe the basis of his medical judgment that such an emergency exists on a form prescribed by the Department as required by Section 10 of this Law.~~

~~(3) Penalty. Any person who intentionally, knowingly, or recklessly violates the requirements of paragraph (B)(1) or~~

~~paragraph (B) (2) of Section 3.1, or regulations promulgated thereunder, commits a Class A misdemeanor.~~

(Ch. 38, par. 81-25) [S.H.A. ch. 38, ¶ 81-25]

Sec. 5. (1) No abortion not necessary to preserve the life ~~or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable on a form prescribed by the Department under Section 10 of this Law.~~

(1) ~~(2)~~ When the fetus is viable no abortion shall be performed unless in the medical judgment of the attending or referring physician, based on the particular facts of the case before him, it is ~~medically~~ necessary to preserve the life or health of the mother. Intentional, knowing, or reckless failure to conform to the requirements of subsection paragraph (1) ~~(2)~~ of Section 5 is a Class 2 felony.

(2) ~~(3)~~ When the fetus is viable the physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Law, the medical indications which, in his medical judgment based on the particular facts of the case before him, warrant performance of the abortion to preserve the life or health of the mother.

(Ch. 38, par. 81-26) [S.H.A. ch. 38, ¶ 81-26]

Sec. 6. (1) (a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act[1], the

[1] Paragraph 81-30 of this chapter.

available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(1)(a) commits a Class 3 felony.

(2) (a) No abortion shall be performed or induced when the fetus is viable unless there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for any child born alive as a result of the abortion. This requirement shall not apply when, in the medical judgment of the physician performing or inducing the abortion based on the particular facts of the case before him, there exists a medical emergency; in such a case, the physician shall describe the basis of this judgment on the form prescribed by Section 10 of this Act. Any physician who intentionally performs or induces such an abortion and who intentionally, knowingly, or recklessly fails to arrange for the attendance of such a second physician in violation of Section 6(2)(a) commits a Class 3 felony.

(b) Subsequent to the abortion, if a child is born alive, the physician required by Section 6(2)(a) to be in attendance shall exercise the same degree of professional skill, care and diligence to preserve the life and health of the child as would be required of a physician providing immediate medical care to a child born alive in the course of a pregnancy termination which was not an abortion. Any such physician who intentionally, knowingly, or recklessly violates Section 6(2)(b) commits a Class 3 felony. ~~No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to~~

~~encourage or to sustain the life of a fetus known to be viable, before or after birth, commits a Class 2 felony if the death of a viable fetus or infant results from such failure~~.

(3) ~~(2)~~ The law of this State shall not be construed to imply that any living individual organism of the species homo sapiens who has been born ~~human being aborted~~ alive is not an individual under the "Criminal Code of 1961," approved July 28, 1961, as amended.[2]

~~(3) No person shall use or sell any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive. Any person who shall use or sell a fetus in violation of this Section, even a fetus aborted to protect or preserve the life and health of the mother, is guilty of a Class 1 felony. Nothing in this Law shall prohibit the use or sale of any tissues or cells obtained from a dead fetus or dead premature infant whose death did not result from an induced abortion for use in therapeutic or scientific research, provided that written consent for such use or sale is obtained from one of the parents of such an infant or fetus. Intentional, knowing or reckless failure of any person to obtain such consent for such use or sale is a Class A misdemeanor~~.

~~(4) No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of~~

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[2] Paragraph 1-1 et seq. of this chapter.

~~the mother, with or without artificial support. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure~~.

(4) (a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable possibility of sustained survival of the fetus outside the womb, with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(4) (a) commits a Class 3 felony.

(5) Nothing in Section 6 requires a physician ~~or any other person~~ to employ a method of abortion ~~any measures to encourage or sustain the life of the fetus during the course of a pregnancy termination~~ which, in the medical judgment of the physician performing the abortion ~~pregnancy termination~~ based on the particular facts of the case before him, would increase medical risk to the mother.

(6) When the fetus is viable and when there exists reasonable medical certainty (a) that the particular method of abortion to be employed will cause organic pain to the fetus, and (b) ~~there exists reasonable medical certainty~~ that use of an anesthetic or analgesic ~~which the physician knows to be available~~ would abolish or alleviate organic pain to the fetus caused by the particular method of abortion to be employed, then the

physician who is to perform the abortion or his agent or the referring physician or his agent shall inform the woman upon whom the abortion is to be performed that such an anesthetic or analgesic is available, if he knows it to be available, for use to abolish or alleviate organic pain caused to the fetus by the particular method of abortion to be employed. Any person who performs an abortion with knowledge that any such reasonable medical certainty exists and that such an anesthetic or analgesic is available, ~~or with reckless disregard as to whether any such reasonable medical certainty exists,~~ and intentionally fails to so inform the woman or to ascertain that the woman has been so informed commits a Class B misdemeanor. The foregoing requirements of subsection Paragraph (6) of Section 6 shall not apply (a) when, in the medical judgment of the physician who is to perform the abortion or the referring physician based upon the particular facts of the case before him: (i), there exists a medical emergency, or (ii) the administration of such an anesthetic or analgesic would decrease a known possibility of sustained survival of the fetus apart from the body of the mother, with or without artificial support, or (b) ~~Paragraph (6) of Sectio shall not apply~~ when the physician who is to perform the ab on administers an anesthetic or an analgesic to the woman or the fetus ~~to abolish or alleviate pain caused to her by the particular method of abortion employed~~ and he knows there exists reasonable medical certainty that such use will abolish organic pain caused to the fetus during the course of the abortion.

(7) Any person who intentionally causes the fertilization of a human ovum by a human sperm outside the body of a living human female shall, with regard to the human being thereby produced, be deemed to have the care and custody of a child for the purposes of Section 4 of the Act to Prevent and Punish Wrongs to Children, approved May 17, 1877, as amended,[3] except, that nothing in that Section shall be construed to attach

[3] Chapter 23, ¶ 2354.

any penalty to participation in the performance of a lawful pregnancy termination.

(8) No person shall intentionally perform an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus. Nothing in Section 6(8) shall be construed to proscribe the performance of an abortion on account of the sex of the fetus because of a genetic disorder linked to that sex. If the application of Section 6(8) to the period of pregnancy prior to viability is held invalid, then such invalidity shall not affect its application to the period of pregnancy subsequent to viability.

(Ch. 38, par. 81-30) [S.H.A. ch. 38, ¶ 81-30]

Sec. 10. A report of each abortion performed shall be made to the Department on forms prescribed by it. Such report forms shall not identify the patient by name, but by an individual number to be noted in the patient's permanent record, in the possession of the physician, and shall include information concerning:

(1) ~~(a)~~ Identification of the physician who performed the abortion and the facility where the abortion was performed and a patient identification number;

(2) ~~(b)~~ State~~, county and municipality~~ in which the patient resides;

(3) ~~(c)~~ Patient's date of birth, race and marital status;

(4) ~~(d)~~ Number of prior pregnancies;

(5) ~~(e)~~ Date of last menstrual period;

(6) ~~(f)~~ Type of abortion procedure performed;

(7) ~~(g)~~ Complications and whether the abortion resulted in a live birth;

(8) ~~(h)~~ The date the abortion was performed;

(9) ~~(i)~~ Medical ~~Certification that the fetus was not viable or medical~~ indications for any abortion performed when the fetus was viable;

(10) The information required by Sections 6(1)(b) and 6(4)(b) of this Act,[1] if applicable;

~~(j) Medical indications for the use of saline amniocentesis;~~

~~(k) Medical indications for the nullification of any waiting period required under this law;~~

(11) ~~(l)~~ Basis for any medical judgment that a medical emergency existed when as required under Sections 6(2)(a) and 6(6) and when required to be reported in accordance with this Section by any provision ~~Sections 3.1, 3.2, 3.3 or 3.4~~ of this Law; and

(12) The pathologist's test results pursuant to Section 12 of this Act.[2]

~~(m) The basis for the clinical judgment that an abortion is necessary;~~

~~(n) The date of the medical consultation required by paragraph (B) of 3.1, the time it began and the time it ended, and~~

~~(o) The results of a pregnancy test performed on the woman prior to the abortion and the pathologist's test results pursuant to Section 12 of this Act.~~

Such form~~, designated the "Original Report,"~~ shall be completed by the hospital or other licensed facility, signed by the physician who performed the abortion or pregnancy termination, and transmitted to the Department not later than 10 days following the end of the month in which the abortion was performed. ~~Attached to each such form transmitted to the~~

[1] Paragraph 81-26 of this chapter.

[2] Paragraph 81-32 of this chapter.

~~Department shall be a completed form designated the "Redacted Copy" which shall be identical in all particulars to the "Original Report" except that the patient identification number, the material required by paragraph (a) of Section 10, and the physician's name shall be omitted~~.

In the event that a complication of an abortion occurs or becomes known after submission of such form, a correction using the same patient identification number shall be submitted to the Department within 10 days of its becoming known.

The Department may prescribe rules and regulations regarding the administration of this Law and shall prescribe regulations to secure the confidentiality of the woman's identity in the information to be provided under the "Vital Records Act".[3] ~~in a manner which accords with the policy described in the following paragraph.~~

~~All information obtained by a physician, hospital or ambulatory health facility from a patient for the purpose of preparing reports to the Department under this Section shall be available to the Department for inspection in its capacity as a regulatory agency and for statistical and informational purposes in its capacity as a public service agency but shall not be disclosed publicly in such manner as to identify individual patients, except that the Department may disclose any information to another State agency required or authorized to conduct investigations of professional or business practices in hospital, ambulatory surgical treatment center, or other facility. State agencies conducting such investigations shall not disclose individual patient information publicly.~~ All reports received by the Department shall be treated as confidential and the Department shall secure the woman's anonymity. Such reports and shall be used only for statistical purposes. ~~except to the extent necessary to secure the rights or interests of a person or the~~

[3] Chapter 111½ ¶ 73-1 et seq.

~~State pursuant to a court order in civil or criminal actions or proceedings to grant or revoke licenses. However, after each Redacted Copy has been compared to the Original Report by the Department to ensure its accuracy, all Redacted Copies shall be made available by the Department to the public for inspection and reproduction during normal business hours at its principal office.~~

Upon 30 days public notice, the Department is empowered to require reporting of any additional information which, in the sound discretion of the Department, is necessary to develop statistical data relating to the protection of maternal or fetal life or health, or is necessary to enforce the provisions of this Law, or is necessary to develop useful criteria for medical decisions. The Department shall annually report to the General Assembly all statistical data gathered under this Law~~;~~ and its recommendations to further the purpose of this Law~~, and its recommendations to further the interest of this State in assuring the integrity of the woman's decision and in protecting the life and health of women, infants and unborn children through the course of childbearing and birth.~~

The requirement for reporting to the General Assembly shall be satisfied by filing copies of the report with the Speaker, the Minority Leader and the Clerk of the House of Representatives and the President, the Minority Leader and the Secretary of the Senate and the Legislative Council, as required by Section 3.1 of "An Act to revise the law in relation to the General Assembly", approved February 25, 1874, as amended,[4] and filing such additional copies with the State Government Report Distribution Center for the General Assembly as is required under paragraph (t) of Section 7 of the State Library Act.[5]

(Ch. 38, par. 81-31) [S.H.A. ch. 38, ¶ 81-31]

Sec. 11. (1) ~~(a)~~ Any person who intentionally violates any provision of this Law commits a Class A misdemeanor unless a

[4] Chapter 63, ¶ 3.1.

[5] Chapter 128, ¶ 107.

specific penalty is otherwise provided. Any person who intentionally falsifies any writing required by this Law commits a Class A misdemeanor.

Intentional, knowing, reckless, or negligent violations of this Law shall constitute unprofessional conduct which causes public harm under Section 16 of the "Medical Practice Act", approved June 30, 1923, as amended;[1] Section 15 of the "Illinois Nursing Act", approved June 14, 1951, as amended,[2] and Section 11 of the "Physician's Assistants Practice Act", approved September 11, 1975, as amended.[3]

Intentional, knowing, reckless or negligent violations of this Law will constitute grounds for refusal, denial, revocation, suspension, or withdrawal of license, certificate, or permit under Section 7.6 of the "Pharmacy Practice Act", approved July 11, 1955, as amended;[4] Section 7 of the "Ambulatory Surgical Treatment Center Act", effective July 19, 1973, as amended;[5] and Section 7 of the "Hospital Licensing Act", approved July 1, 1953, as amended.[6]

(2) ~~(b)~~ Any hospital or licensed facility which, or any physician who intentionally, knowingly, or recklessly fails to submit a complete report to the Department in accordance with the provisions of Section 10[7] of this Law and any person who intentionally, knowingly, recklessly or negligently fails to maintain the confidentiality of any ~~original~~ reports required under this Law or reports required by Sections 10.1 or 12[8] ~~paragraph (c) of Section 11~~ of this Law commits a Class B misdemeanor.

~~(c) Any person, firm, corporation, association, agency, institution, or other legal entity which solicits, offers or receives~~

[1] Chapter 111, ¶ 4433.
[2] Chapter 111, ¶ 3420.
[3] Chapter 111, ¶ 4762.
[4] Chapter 111½, ¶ 4019.
[5] Chapter 111½, ¶ 157-8.7.
[6] Chapter 111½, ¶ 148.
[7] Paragraph 81-30 of this chapter.
[8] Paragraphs 81-30.1 or 81-32 of this chapter.

~~any kickbacks or bribes in connection with the performance of an abortion or which solicits, offers or receives a rebate or a fee for referring an individual to another person for the providing of an abortion commits a Class A misdemeanor.~~

(3) ~~(d)~~ Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

~~(e) Any physician who diagnoses a woman as having complications resulting from an abortion shall report the patient's name, the diagnosis and a summary of her physical symptoms to the Department. If the physician making the diagnosis of a complication knows the identity of the physician who performed the abortion or the name or location of the facility where it was performed, he shall also report such information to the Department. Any physician who intentionally or knowingly violates paragraph (e) of Section 11 commits a Class C misdemeanor.~~

(4) ~~(f)~~ Any person who intentionally, knowingly or recklessly performs upon a woman what he represents to that woman to be an abortion when he knows or should know that she ~~procedure upon a woman who~~ is not pregnant commits a Class 2 felony and shall be answerable in civil damages equal to 3 times the amount of proved damages.

(Ch. 38, par. 81-32) [S.H.A. ch. 38, ¶ 81-32]

Sec. 12. The dead fetus and all tissue removed at the time of abortion shall be submitted for a gross and microscopic analysis and tissue report to a board eligible or certified

pathologist as a matter of record in all cases. The results of the analysis and report shall be given to the physician who performed the abortion within 7 days of the abortion and such physician shall report any complications relevant to the woman's medical condition to his patient within 48 hours of receiving a report if possible. ~~There shall be no exploitation of or experimentation with the aborted fetus or tissue.~~ Any evidence of live birth or of viability shall be reported within 7 days, if possible, ~~immediately~~ to the Department by the pathologist. Intentional failure of the pathologist to report any evidence of live birth or of viability to the Department is a Class B misdemeanor ~~2 felony~~.

(Ch. 38, par. 81-34) [S.H.A. ch. 38, ¶ 81-34]

Sec. 14. (1) If any provision, word, phrase or clause of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this Act which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this Act are declared to be severable.

(2) ~~Distribution of the printed information prescribed by Section 3.5 of this Law shall not be required by any part of this Law until the Department publishes notice that such materials are initially available.~~ Within 60 days from the time this Section becomes law, the Department shall issue regulations ~~pursuant to paragraph (B) of Section 3.1 and~~ pursuant to Section 10,~~,[1] insofar as Section 10 requires regulations relating to registration under the "Vital Records Act". Neither paragraph (B) of Section 3.1 nor Section 10,~~ Insofar as Section 10 requires registration under the "Vital Records Act",[2] it shall not take effect until such regulations are issued. The Department

[1] Paragraph 81-30 of this chapter.

[2] Chapter 111½, ¶ 73-1 et seq.

shall make available the forms required under Section 10 within 30 days of the time this Section becomes law. No requirement that any person report information to the Department shall become effective until the Department has made available the forms required under Section 10. All other provisions of this amended Law shall take effect immediately upon enactment.

(Ch. 38, rep. pars. 81-23.2, 81-23.4, 81-23.5, 81-24, 81-27, 81-28, 81-29, 81-31.2 and 81-31.3) [S.H.A. ch. 38, ¶¶ 81-23.2, 81-23.4, 81-23.5, 82-24, 81-27, 81-28, 81-29, 81-31.2, 81-31.3 repealed]

Section 2. Sections 3.2, 3.4, 3.5, 4, 7, 8, 9, 11.2 and 11.3 of the "Illinois Abortion Law of 1975", veto overridden November 20, 1975, as amended, are repealed.

Section 3. Sections 5 and 6 of the "Parental Notice of Abortion Act of 1983", veto overridden November 2, 1983, are amended and Section 8.1 is added thereto, the added and amended Sections to read as follows:

(Ch. 38, par. 81-65) [S.H.A. ch. 38, ¶ 81-65]

Sec. 5. Procedure for waiver of notice. (a) The requirements and procedures under this Act are available to minors and incompetents whether or not they are residents of this State.

(b) The minor or incompetent may participate in proceedings in the court on her own behalf and the court shall appoint a guardian ad litem for her. The court shall advise her that she has a right to court appointed counsel and shall provide her with such counsel upon her request.

(c) Court proceedings under this Section shall be confidential and shall ensure the anonymity of the minor or incompetent. These proceedings shall be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly, but in no case shall the court fail to rule within 48 hours of the time of

application, provided that the 48 hour limitation may be extended at the request of the minor or incompetent.

(d) Notice shall be waived if the court finds either:

(i) That the minor or incompetent is mature and well-informed enough to make the abortion decision on her own, or

(ii) That notification of those to whom Section 4 of this Act[1] requires that notice be given would not be in the best interests of the minor or incompetent.

(e) A court that conducts proceedings under this Section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(f) An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice.

(g) The Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

(h) No filing fees shall be required of any minor or incompetent who avails herself of the procedures provided by this Section.

(Ch. 38, par. 81-66) [S.H.A. ch. 38, ¶ 81-66]

Sec. 6. Medical emergency exception. The requirements of Section 4 of this Act[1] shall not apply when, in the best medical judgment of a ~~the~~ physician based on the facts of the case before him, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion. A physician who does not comply with Section 4 of this Act by reason

[1] Paragraph 81-64 of this chapter.

[1] Paragraph 81-64 of this chapter.

of this exception shall certify in writing the medical indications on which his judgment was based.

A report indicating the basis for any medical judgment that warrants failure to give notice pursuant to this Act shall be filed with the Department of Public Health of the State of Illinois on forms prescribed by the Department. Dissemination of ~~an original and a redacted copy of~~ this report shall comply with the reporting and confidentiality requirements of Section 10 of the Illinois Abortion Law of 1975.[2]

(Ch. 38, new par. 81-68.1) [S.H.A. ch. 38, ¶ 81-68.1]

Sec. 8.1. If any provision, word, phrase or clause of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this Act which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this Act are declared to be severable.

Sec. 4. This Act takes effect upon becoming a law.

[S.H.A. ch. 38, ¶ 81-22 note]

VETO OVERRIDDEN: June 30, 1984

EFFECTIVE: June 30, 1984

[2] Paragraph 81-30 of this chapter.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,

Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,

Appellees,

AND

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,

Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

Reply Brief of Appellants Eugene F. Diamond, M.D. and Jasper F. Williams, M.D.

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ARGUMENT

INTRODUCTION

The fact that Illinois has attempted to regulate abortion does not indicate "defiance of the United States Constitution" or bad faith.[1] Brief of Plaintiffs-Appellees (Pl.App.Br.)

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[1] Proper deference for state legislative enactments requires that laws which are designed to protect the legitimate and compelling interests that this Court recognized in *Roe v. Wade*, 410 U.S. 113 (1973), be presumed to be constitutional unless it is shown that they burden the fundamental rights recognized by this Court. At a minimum, appropriate constitutional analysis demands that the scope of the right be delineated and the extent of the burden on that right, if any, be articulated before a law may be declared unconstitutional.

at 2-5. The lower courts in this case have consistently rejected Appellees' assertion that the legislative intent of this law is unconstitutional and that the challenged provisions are, therefore, unconstitutional. *See, e.g., Charles v. Carey*, 627 F.2d 772, 778-779 (7th Cir. 1980). These courts have honored the express intent of the Illinois legislature to regulate abortion in a constitutional manner:

> It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. . . . It is the further intention of the General Assembly to assure and protect the woman's health and the integrity of the woman's decision whether or not to continue to bear a child, [and] to protect the valid and compelling state interest in the infant and unborn child. . . .

Ill.Rev.Stat. ch. 38, ¶ 81-21 (1983). The challenged provisions further the legitimate purposes for which they were enacted: to protect the woman's decision of whether to use an abortifacient and to protect the viable unborn child in whom the State has a compelling interest. They are not presumptively unconstitutional.

Moreover, not every law which touches upon abortion can be presumed to burden that right. Appellees have failed to satisfy their burden of first establishing that the challenged provisions burden the woman's fundamental right recognized by this Court in *Roe*. Rather, they assume throughout their brief that the challenged provisions burden constitutionally protected rights. They fail, however, to clearly delineate those rights or to establish factually that a "burden" on those rights actually exists. For example, the constitutional right that is protected is a right to choose. There are no facts in the record to indicate that any woman who wishes to use abortifacients would be burdened by being informed that she is using one.[2] Likewise, Appellees do not

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[2]The conclusory statements contained in Appellees' affidavits do not support this claim.

state whether the woman's right to terminate pregnancy includes a right to ensure fetal death. If the right to terminate pregnancy does not include a right to ensure fetal death, then a law which prevents a physician from performing an abortion in a manner that ensures fetal death does not burden any constitutional right.

I. SECTIONS 2(10) AND 11(d) ARE CONSTITUTIONAL.

Sections 2(10) and 11(d) of the Illinois law are designed to protect the constitutional rights of women to make informed decisions regarding the use of birth control. These provisions require that physicians who administer or prescribe an abortifacient inform their patients that they are doing so.

Appellees claim that §§ 2(10) and 11(d) are unconstitutional for three reasons: 1) they require the transmission of inaccurate information which is contrary to accepted medical practice and thereby influence women against choosing certain birth control measures; 2) they violate the free speech rights of physicians; and 3) they are vague. In addition, Appellees claim that these provisions are preempted by federal statute. These arguments are based upon false premises, and should be rejected by this Court.

A. It Is Medically Accurate To Describe Drugs That Prevent Birth After Fertilization As Abortifacients.

Appellees' first argument is based upon their claim that "[a]ccording to standard medical authorities, conception is not synonymous with fertilization of the ovum," Pl.App.Br. at 17. They insist that conception occurs 6-7 days after fertilization and is synonymous with implantation. *Id.* Thus they contend that §§ 2(10) and 11(d) are unconstitutional because "they require transmission of information that is contrary to accepted medical practice." Pl.App. Br. at 16.

The State of Illinois has retained a definition of conception which is entirely accurate according to traditional and contemporary medical usage and customary usage by the general public. Contrary to Appellees' assertions, the vast

majority of medical authorities equate the terms "fertilization" and "conception."[3] For example, a commonly used medical text states:

> The term conception refers to the union of the male and female pronuclear elements of procreation from which a new living being develops. It is synonymous with the terms fecundation, impregnation and *fertilization*.

Greenhill and Friedman, *Biological Principles and Modern Practice of Obstetrics* 17 (1974) (emphasis added).

Indeed, the very medical authorities cited by Appellees to establish a difference between fertilization and conception use those terms interchangeably. A chart on "Human *preimplantation* stages," in *Williams Obstetrics*, refers to the 2-cell stage which has been "washed from the fallopian tube 1½ days *after conception*." Pritchard, MacDonald & Gant, *Williams Obstetrics* 89 (Fig. 5-7) (17th ed. 1985) (emphasis added). This use of "conception" clearly refers to fertilization, not

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[3] At least seven current medical dictionaries equate these terms. *See, Blakiston's Gould Medical Dictionary* 305 (4th ed. 1979) (conception: "the fertilization of the ovum by the spermatozoon."); *Taber's Cyclopedic Medical Dictionary* 368 (15th ed. 1985) (conception: "2. fertilization"); *Mosby's Medical and Nursing Dictionary* 258 (1983) (conception: "1. the beginning of pregnancy, usually taken to be the instant that a spermatozoon enters an ovum, 2. the act or process of fertilization"); *Butterworth's Medical Dictionary* 400 (2d ed. 1978) (conception: "1. The act of becoming pregnant. 2. The fertilization of the ovum by a spermatozoon and the beginning of the growth of the embryo."); *Melloni's Illustrated Medical Dictionary* 108 (2d ed. 1985) (conception: "2. The fertilization of an ovum or the act of becoming pregnant."); *Urdang Dictionary of Current Medical Terms* 91 (1981) (conception: "1. (in gynecology) the start of pregnancy when a male germ cell (sperm) fertilizes a female germ cell (ovum) in the fallopian tube."); *Black's Medical Dictionary* 217 (33d ed. 1981) ("Conception signifies the complex set of changes which occur in the ovum and in the body of the mother at the beginning of pregnancy. The precise moment of conception is that at which the male element, or spermatozoon, and the female element, or ovum, fuse together.").

implantation. Moreover, *Dorland's* medical dictionary states that conception means "the onset of pregnancy,[4] marked by implantation of the blastocyst; *the formation of the visable* [sic] *zygote.*" *Dorland's Illustrated Medical Dictionary* 296 (26th ed. 1985) (emphasis added). *Dorland's* also states that "[t]he process of fertilization leads to the formation of a zygote and ends with the initiation of its cleavage." *Id.* at 493. Thus, according to *Dorland's*, conception also means fertilization.

Recent redefinition of conception to refer to implantation allows certain drugs and devices which, according to the great weight of medical authority, would be classified as abortifacients, to be reclassified as contraceptives. Such redefinition by some does not require the State to adopt that new definition; rather, it simply highlights the need for §§ 2(10) and 11(d) to eliminate the resulting confusion that is inevitable. Women are entitled to accessible, common sense information in order to be able to choose between methods of birth control which prevent fertilization and those which prevent birth after fertilization has taken place.

Appellees maintain that these provisions undermine informed consent by imposing a "theory of life" on women and attempting to "influence" a woman's choice against birth control. Both claims are groundless. No "theory of life" is espoused by these provisions. As Appellants have established, the definition of abortifacient, and the distinction between abortifacient and contraceptive methods of birth control, is well-supported by competent medical authority. Illinois is merely acknowledging that a large segment of its

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[4] Pregnancy is defined as "the condition of having a developing embryo or fetus in the body, after union of an ovum and spermatozoon. In women duration of pregnancy is about 266 days." *Dorland's* at 1063. "The expected time of birth is roughly calculated as 266 days *after fertilization.*" Moore, *Before We Are Born: Basic Embryology and Birth Defects* 59 (1976) (emphasis added). Thus, pregnancy according to *Dorland's* begins at fertilization. If it began at implantation, the duration of pregnancy would be approximately 6-7 days shorter, or 259-260 days.

population considers this distinction very important. It is entitled to ensure that women are provided this information in order to protect their fundamental right to choose whether or not to use abortifacients. This information does not influence a woman's decision for or against a particular means of birth control in any impermissible way. Women who are opposed to using abortifacients will presumably respond to this information by seeking other, non-abortifacient methods of birth control. Women who are not opposed to using them will use them.

B. No First Amendment Right of Physicians Is Offended by Sections 2(10) and 11(d).

Appellees' claim that these sections infringe upon their First Amendment right is based upon the erroneous assumption that doctors must use the term "fetal death" in describing the effects of the drugs and devices they prescribe for women. Appellees' reading of §§ 2(10) and 11(d), however, consistently has been rejected as contrary to their plain language and the authoritative construction given by those responsible for their enforcement.[5] *See*, Appellants' Opening Brief (App.Br.) at 11-12, 17-19. Since doctors are required only to give medically accurate information to their patients, Appellees' First Amendment claims must be rejected.

The State may surely prevent physicians from administering abortifacients without the knowledge and consent of their patients. To hold otherwise would call into question all malpractice claims based on failure to obtain informed consent as violations of the physician's right not to speak.

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[5] Appellees make much of the fact that Attorney General Hartigan and State's Attorney Daley adopted Appellants' brief, which contained the construction set forth above, rather than submitting briefs of their own. Pl.App.Br. at 24, n.31. However, they cite no authority which supports their suggestion that an independent submission is necessary. The Attorney General and the State's Attorney both adopted the brief and arguments contained therein "as their own." As such, it is as though they had written it themselves.

C. Sections 2(10) And 11(d) Are Not Vague.

Section 2(10) clearly distinguishes between drugs that work prior to fertilization and those that operate after fertilization. Section 11(d) applies only to those drugs which operate after fertilization and it applies only when the physician knows that the drug or device operates after fertilization and it does in fact so operate. A physician who knows that a drug he is about to administer operates after fertilization must inform his patient of that fact. Moreover, he may not be held criminally liable under this provision unless the drug is in fact an abortifacient. Thus, physicians are given fair notice of what the law requires and have a reasonable opportunity to conform their conduct to the law.

Appellees have raised four specific examples of alleged vagueness which were not raised below. First, they claim that it is unknown whether the statute imports a purely subjective standard or imposes a mixed subjective and objective standard. Pl.App.Br. at 25. Section 2(10) defines abortifacient to include only those drugs which are *known* to be abortifacients. It does so in recognition of the fact that there are certain drugs that may be suspected to have an abortifacient effect but have not yet been proven to have such effect. Thus, § 2(10) excludes from coverage drugs which have not been accepted throughout the medical community as abortifacients.[6] Section 11(d) contains two additional layers of protection for the physician. Criminal liability cannot attach unless he (subjectively) knows that it is an abortifacient and it is (objectively) in fact an abortifacient. There is no danger of the unwary being trapped by this law.

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[6] As Appellees themselves admit, Pl.App.Br. at 18, the exact mechanisms of the IUD and stilbestrol are yet unknown. *See also*, J. Lippes, *Nonmedicated IUDs: History, Mechanisms of Action, and Clinical Effectiveness*, Chap. 28, *Fertility Regulation, Psychosomatic Problems, and Human Sexuality*, in 6 Sciarra, ed. Gynecology & Obstetrics 3 (Rev. ed. 1985) ("In spite of 20 years of renewed interest and research on IUDs, an understanding of the mechanism of action in the human female remains elusive."). *Id.* at 3.

Appellees' second argument is that §§ 2(10) and 11(d) are vague because many drugs which are "suspected to increase the chances of spontaneous abortion" may also fall within these sections. Pl.App.Br. at 26. The legislature never intended this law to cover drugs with an incidental abortifacient effect. Rather, this law was intended to include methods of birth regulation whose mode of action is abortifacient.

The third argument raised by Appellees appears to rest on the assumption that the legislature intended the term "person" to include corporate persons and that corporations would be precluded from selling abortifacients under § 11(d). Certainly, the legislature did not intend to place a "total ban" on the sale of such drugs. *See*, Pl.App.Br. at 26. When the General Assembly wishes to regulate corporate persons it explicitly does so. Section 11(c), for example, where corporations were intended to be regulated, states: "Any person, firm, corporation, association, agency, institution, or other legal entity. . . ." Pl.App.Br. at SA-24, Ill.Rev.Stat. ch. 38, ¶ 81-31(c) (1983). The failure to explicitly include corporations in the section immediately following, § 11(d), indicates that the General Assembly did not intend them to be regulated by that provision.

The final vagueness claim is that a physician cannot act in compliance with § 11(d) without violating § 11(4), the prohibition against fraudulent abortions.[7] There is no internal inconsistency between these provisions and a physician need not violate one to comply with the other. A physician who is administering an abortifacient to a patient whom he *knows* is *not* pregnant, certainly would not tell that

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[7]Section 11(4) [formerly § 11(f) Ill.Rev.Stat. ch. 38, ¶ 81-31(f) (1983)] prohibits a physician from *performing* what he represents to be an abortion, when he *knows* that the woman is *not* pregnant. Ill.Rev.Stat. ch. 38, ¶ 81-31(4) (1984 Supp.). Section 11(d), on the other hand, applies to the *administration or prescription* of drugs and devices which will prevent birth after fertilization if the woman becomes pregnant or is known to *be* pregnant.

patient that he is *performing an abortion* upon her. Rather, utilizing the flexibility allowed under § 11(d), he should explain to her that although she is not now pregnant, the drug or device will terminate her pregnancy should she become pregnant in the future.

D. The Issue Of Preemption Is Not Properly Before This Court.

Appellees contend that §§ 2(10) and 11(d) of the Illinois statute are preempted by the 1976 Amendments to the Federal Food, Drug, and Cosmetic Act. 21 U.S.C. §300 (1982). Pl.App.Br. at 21 n.26. This Court has often stated that it will not consider questions which were not "plainly raised" in the complaint nor "specifically passed upon by the lower courts." *Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694, 2699 (1984). None of the factors cited by the Court in *Capital Cities* which allow review of an issue, not set forth in the questions presented, are present here. The issue of preemption was neither raised in the complaint, nor addressed by the district court or court of appeals, and this Court has not ordered the parties to address it. Therefore, it should not be considered by this Court.[8]

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[8] Even if this issue were properly before this Court, it fails on several grounds. First, there is no support in the record for the assumption that §§ 2(10) and 11(d) apply to the IUD or stilbestrol. *See* this brief at 7 n.6.

Second, even if there are drugs and devices which are subject to regulation under both the Medical Device Amendments and the Illinois law, Appellees have failed to establish that this overlap is forbidden by clear Congressional intent, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 103 S.Ct. 1713, 1722 (1983), or by actual conflict between the state and federal law. *Id.* When, as here, a State's exercise of its police power is claimed to be preempted, " 'the assumption [is] that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Section 521 of the Medical Device Amendments, 21 U.S.C. § 360k (1982), preempts only

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II. SECTION 6(1) IS JUSTIFIED BY THE COMPELLING STATE INTEREST IN THE LIFE AND HEALTH OF VIABLE FETUSES, AND WHEN READ IN CONJUCTION WITH SECTION 6(5), PROTECTS THE LIFE AND HEALTH OF WOMEN UNDERGOING POST-VIABILITY ABORTIONS.[9]

Throughout its abortion decisions, this Court has recognized that the State has a compelling interest in the life and health of the viable fetus. In order to avoid the consequences of the compelling state interest that supports § 6(1), Appellees have asserted two claims against that provision. First, Appellees argue that § 6(1) is vague because it does not specify that the attending physician's determination of viability is controlling. Second, Appellees contend that § 6(1) jeopardizes the health of women undergoing post-viability abortions. Both arguments are predicated upon an erroneous construction of § 6(1), and are without merit.

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those statutes "which relate [ ] to the *safety and effectiveness*" of covered devices. Thus, Congress has regulated the safety and effectiveness of certain drugs and devices, but has expressed no intent of regulating the physician-patient relationship with regard to their mode of action.

Finally, there is no actual conflict between federal and state law. The federal regulations apply to inserts prepared by manufacturers. In order to comply with both the federal and state law, a physician must simply ensure that the federally-mandated information circular, if any, be dispensed along with the drug or device. In addition, if he knows that the drug or device acts after union of the egg and sperm to interrupt a pregnancy, he must inform a patient of this fact. In no way does this prevent the physician from meeting his obligations under federal law. Nor does it "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 104 S.Ct. 615, 621 (1984).

[9] Unamended § 6(1) is discussed here because Appellees' arguments are based on it. Appellants, however, continue to argue that unamended § 6(1) is moot. *See,* App.Br. at 27-29.

The premise of Appellees' vagueness argument is that "Section 6(1) . . . applies to fetuses which are 'known to be viable' by persons other than the attending physician." Pl.App.Br. at 28. The District Court, however, had no difficulty in understanding this section and upheld it. *Charles v. Carey*, 579 F.Supp. 464, 473 (N.D.Ill. 1983). The standard for viability under § 6(1) is a subjective one, and a violation of the standard of care must be knowing and intentional. Contrary to Appellees' contention, the phrase "known to be viable" has one meaning: "known by the attending physician to be viable." *See* § 2(1) and App.Br. at 34-35. Whether applied to the attending physician, or to those assisting during an abortion, a fetus is "known to be viable" only when the attending physician has determined that there is a reasonable likelihood of survival apart from the mother. Appellees' contention that § 6(1) allows the determination of viability by someone other than the attending physician to control is thus unsupported.

Appellees' second argument is that § 6(1) gives inadequate protection to the life and health of women seeking post-viability abortions. Although § 6(1) requires physicians to utilize a method of abortion that is least threatening to fetal life and health, § 6(5) states that this requirement need not be followed when to do so would "increase medical risk to the mother." *See* App.Br. at 30. Appellees argue, however, that § 6(5) does not apply to the selection of abortion methods. Thus, they claim that a doctor may be required to select a method of abortion which increases risk to the mother. However, since he would not be required to *use* that method "during the course of the pregnancy termination" if it increased risk to the mother, the choice of a method of abortion which is less safe for the mother would never have any effect. Certainly the General Assembly did not intend such a meaningless exercise as Appellees' reading would require. Section 6(5) applies to all *measures* undertaken "during the course of a pregnancy termination." This has been presumed throughout this litigation to refer to *all* phases of a

pregnancy termination including the selection of abortion method. No other interpretation of § 6(5) is reasonable.[10]

Appellees also misconstrue the term "medical risk" as it is employed in § 6(5). The fact that this term is not defined in the Illinois abortion law is irrelevant. It has a common sense meaning that is entirely consistent with the construction urged by Appellants: risk to the woman's life or health. *See* App.Br at 36. Appellees dismiss this construction as "mere speculation," Pl.App.Br. at 33, but provide no guidance whatsoever as to how "medical risk" might be differently defined. This Court should not be sidetracked by Appellees' deliberate attempts to confuse the meaning of easily understandable words. Moreover, statutes should be construed in a manner that avoids constitutional challenge. *See*, App.Br. at 35.

The argument that § 6(1) denies women access to proper medical care and advice by requiring that physicians give priority to the unborn child is likewise unsupported in the text. Section 6(1) requires a physician to take account of fetal life and health only where he has made a determination that the fetus is viable. Appellees' entire argument ignores the fact that once this determination has been made, the state interest in fetal life and health becomes compelling.

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[10] The exemption in § 6(5) applies to all of the provisions of § 6, many of which regulate various aspects of late term abortions not limited to the actual performance of the surgery. The exemption in § 6(5), then, must apply to all of these aspects, including the selection of the abortion procedure. Moreover, § 6(5), as amended by H.B. 1399, states:

> Nothing in Section 6 requires a physician to employ a method of abortion which, in the medical judgment of the physician performing the abortion based on the particular facts of the case before him, would increase medical risk to the mother.

Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1984 Supp.).

The unamended version is no longer on the statute books and the new section clearly applies to the selection of methods of abortion.

To hold, as Appellees argue, that the State may not limit a woman's or physician's discretion in the post-viability abortion decision would be to render that "compelling" interest a legal nullity. In this facial challenge, it is Appellees' burden, as plaintiffs, to establish that § 6(1) impermissibly diminishes the standard of care towards pregnant women. Since there is nothing in the text of §§ 6(1) and 6(5), nor in the record, to support such a conclusion, Appellees have failed to meet this burden. The decision of the Court of Appeals invalidating § 6(1) should be reversed.

III. SECTION 6(4) IS A VALID EXERCISE OF THE COMPELLING STATE INTEREST IN THE LIFE OF THE UNBORN CHILD WHO IS POTENTIALLY ABLE TO SURVIVE OUTSIDE OF THE WOMB.[11]

The State of Illinois, in furtherance of its interest in protecting fetal life to the maximum extent permitted by the decisions of this Court, has enacted § 6(4). This provision applies a standard of care identical to that in § 6(1) when, in the judgment of the physician performing the abortion, there exists a possibility of fetal survival. Like the § 6(1) standard, § 6(4) does not apply when use of the fetal survival method of abortion would increase risk to the mother. *See*, App.Br. at 40-41.

Appellees' argument against § 6(4) is based upon two claims: (1) that § 6(4) "severely restricts abortions prior to viability;" and (2) that § 6(4) interferes with a woman's constitutional right to obtain a safe abortion. Both claims are erroneous.

In *Roe*, this Court held that the State's interest in protecting fetal life becomes compelling when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160. Section 6(4) is parallel to this definition: It applies when there is a "possibility" of "sustained survival of the fetus apart from the body of the

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[11] Unamended § 6(4) is discussed here because Appellees' arguments are based on it. Appellants, however, continue to argue that unamended § 6(4) is moot. *See*, App.Br. at 27-29.

mother with or without artificial support." Since "potential" means existing in possibility, *see* App.Br. at 44, n.27, § 6(4) does not regulate prior to viability as that term is defined in *Roe*. The physicians' good faith determination of viability cannot be second-guessed. As is the case throughout the Illinois abortion law, the determination of viability is left up to the attending physician, and is to be based on the particular facts of the case before him.

Appellees' contention that § 6(4) interferes with a woman's constitutional rights also lacks foundation. Under *Roe*, the Constitution protects a woman's decision whether or not to continue a pregnancy. Section 6(4) merely regulates the choice of method of abortion in order to maximize the fetus' possibility of survival.

Section 6(5) applies with equal force to § 6(4) as it does to § 6(1) and, for the reasons set forth in Section II of this brief, Appellees are wrong in suggesting that § 6(4) requires physicians to give priority to the life and health of the unborn child over that of the mother.

Accordingly, the decision of the Court of Appeals invalidating § 6(4) should be reversed.

IV. THIS APPEAL PRESENTS A JUSTICIABLE CASE OR CONTROVERSY.

It is unclear from Appellees' brief whether they contend that this Court lacks jurisdiction because (1) Appellant should not have been granted intervention, or (2) no case or controversy exists. Pl.App.Br. at 11-14. Each of these arguments, however, is without merit and this Court has jurisdiction to decide this appeal.

Almost six years ago, Appellant was granted intervention as a full party based on his asserted economic and professional interests in this litigation.[12] Intervention was not

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[12] That grant of intervention was entirely appropriate. Federal courts have frequently recognized that when a person or group, including physicians, have economic or professional interests which are protected by the legislation under attack,

(footnote continued on next page)

limited to any specific issues and Appellant was permitted to argue and brief on all issues. Although Appellees could have appealed this grant of intervention, they failed to do so, and the time for appeal has long since passed. Thus, they have waived this issue and this Court should not consider this "late blooming argument." *American National Bank & Trust Co. of Chicago v. Haroco, Inc.*, 105 S.Ct. 3291, 3292 (1985).[13]

In *Flast v. Cohen*, 392 U.S. 83, 95 (1968), the Court stated that the "case or controversy" limitation on the power of the federal courts serves basically two functions: (1) to limit "the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process;" and (2) to "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not

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those persons may intervene to defend the statute. *See, e.g., New York Public Interest Research Group v. Regents of University of State of New York*, 516 F.2d 350 (2d Cir. 1975).

As a pediatrician, Dr. Diamond treats newborn infants. Infants who survive abortions and are in need of immediate medical care may become his patients. Just as Appellees are asserting the rights of their prospective patients, Appellant may assert the rights of his prospective newborn patients who survive abortion, to be born with as few handicapping conditions as is possible. Thus, Dr. Diamond has a clear interest in defending §§ 6(1) and 6(4). In addition, as a member of the medical profession, he has a professional and economic interest in ensuring that the standards of the profession are maintained—that abortifacients are not administered to patients without their knowledge and consent.

[13] Reconsideration of Appellant's intervention is especially inappropriate under the facts of this case. This Court has held that an intervenor's right to appeal is enhanced, not undermined, by the fact that the governmental or representative party fails to appeal, since such a failure to appeal may indicate inadequate representation. *Bryant v. Yellen*, 447 U.S. 352, 366 (1980).

intrude into areas committed to other branches of government."

The factors which this Court traditionally considers to be determinative of whether a case or controversy exists are satisfied in this appeal. As Justice Brennan stated, "the gist of the question of standing" is whether "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions" is present.[14] *Baker v. Carr*, 369 U.S. 186, 204 (1962).

There is clear concreteness in this dispute. The State of Illinois has enacted a statute which has been challenged on its face. The issues have been litigated for six years and have been "sharpen[ed]" for review by this Court. The adversary nature of the dispute cannot seriously be questioned. Appellants have been a party to this litigation for six years and have aggressively defended the law along with the named state defendants.[15]

Contrary to Appellees' assertions, the state defendants have never "concede[d] [the] unconstitutionality" of the challenged provisions. Pl.App.Br. at 9. Indeed, in a letter filed with the Clerk of this Court on July 15, 1985 the Attorney General's Office reasserted the constitutionality of the challenged provisions stating: "The Illinois Attorney General's interest in this proceeding is identical to that advanced by it in the lower courts and is essentially co-terminous with the position on the issues set forth by the appellants." *See* Appendix to this brief.

The cases cited by Appellees in support of their argument are not on point. *Princeton University v. Schmid*, 455 U.S. 100

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[14] Appellees citations of standing cases dealing with the ability of plaintiffs to initiate lawsuits are not applicable to Appellant who is a defendant in a case which has been ongoing for six years.

[15] Indeed, Appellees have on numerous occasions claimed that Appellants were responsible for much of the defense of these provisions and Judge Kocoras stated that "the State defendants and intervenors played at least equal roles in defending the abortion statute." *Charles v. Daley*, No. 79-C-4541, 79-C-4548, Memo.Op. at 7 (N.D.Ill. April 22, 1985).

(1982) (per curiam), involved a criminal trespass conviction based on a violation of private university regulations. In contrast, this appeal involves a facial challenge to a state statute upon which the State has taken a position on the merits—one that is co-terminous with that of Appellants. The State also stands ready to enforce the challenged provisions if they are upheld.[16] Thus, unlike *Princeton*, a decision of this Court will not be merely advisory. Moreover, since no appeal of the reversal of the criminal conviction was taken in *Princeton*, only the validity of Princeton's private university regulations was on appeal. The Court dismissed that appeal because it was moot. *Id.*

Appellees' reliance on *City of Chicago v. Chicago Rapid Transit Co.*, 284 U.S. 577 (1931), is equally misplaced. This Court dismissed the appeal of the City of Chicago based on the familiar doctrine, set forth in *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919), that municipal corporations, created by the State and subject to dissolution by the State at any time, have no privileges or immunities under the federal Constitution which they may invoke in opposition to the will of the State. *See*, Bator, Mishkin, Shapiro and Wechsler, *Hart and Wechsler's: The Federal Courts and The Federal System*, 182 (2d ed. 1973).

Intervention was properly granted to Appellants and a case or controversy sufficient to satisfy Article III of the Constitution remains. Therefore, this Court has proper jurisdiction to hear this case.

V. UNAMENDED SECTIONS 6(1) and 6(4) ARE MOOT.

Unamended § 6(4) is clearly moot. That section was enjoined from the day it was enacted unti' the day when it was amended by H.B. 1399. Contrary to Appellees' assertions, Pl.App.Br. at 47 n.60, the General Assembly has never repealed an abortion law and subsequently re-enacted that

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[16] Sections 2(10) and 11(d) would be enforced. However, unamended §§ 6(1) and 6(4) are no longer the law in Illinois and could not be enforced. Sections 6(1) and 6(4), as amended, would be enforced if upheld by this Court. Thus, a decision concerning the unamended provisions would not be advisory.

same provision at a later date.[17] Thus, there is no support whatsoever for Appellees' contention that § 6(4), in its unamended form, will ever be enforced against anyone.

In spite of this fact, Appellees continue to maintain that it is not moot. Pl.App.Br. at 46-48. Their entire argument seems to rest on the claim that the amended version of § 6(4) regulates the same area of abortion as its predecessor. While this argument supports Appellants' claim that the amended version be reviewed, *see* App.Br. at 23-26, it in no way supports Appellees' claim that the old version is not moot.

The remainder of Appellees' arguments concerning unamended §§ 6(1) and 6(4) lack merit and, for the reasons set forth in section II (B) of Appellants' Opening Brief, those sections are moot.

CONCLUSION

For the foregoing reasons, the relief sought in Appellants' Opening Brief, App.Br. at 49, should be granted.

Respectfully submitted,

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October 15, 1985

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[17] Sections 2(10) and 11(d) were not repealed by H.B. 1399. Section 2 of that bill, the repealer section, does not repeal those sections, they were merely renumbered. Pl.App Br. at SA-27, SA-13, SA-25.

APPENDIX

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July 15, 1985

Mr. Alexander L. Stevas
Clerk of the Court
United States Supreme Court
Supreme Court Building
One First Street, N.E.
Washington, D.C. 20543

Re: Diamond & Williams vs. Charles, et al., and
The Hope Clinic for Women, et al., No. 84-1379

Dear Mr. Stevas:

In the spirit of Rule 10.4 of the Rules of Practice of the Supreme Court of the United States, we would like to inform you for the purpose of advising the Court that the State of Illinois, Office of the Attorney General does have an interest in the above-referenced case. Although not an appellant, the Office of the Attorney General, by virtue of having been a party defendant in the United States District Court and before the United States Court of Appeals for the Seventh Circuit, is a party in the United States Supreme Court and is designated an appellee. The Illinois Attorney General's interest in this proceeding is identical to that advanced by it in the lower courts and is essentially co-terminous with the position on the issues set forth by the appellants.

I trust this statement will suffice for the purpose of complying with the statement of interest envisioned by Rule 10.4.

As noted in the attached Certificate of Service, we have served this notice of our interest on the other parties to this action.

Very truly yours,

/s/
Michael J. Hayes
Director of Advocacy
100 W. Randolph, 12th Floor
Chicago, Illinois 60601
312/917-5133

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 84-495 (18)

In The

Supreme Court of the United States

October Term, 1984

RICHARD THORNBURGH, *et al.*,

Appellants,

vs.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

No. 84-1379 (5)

DIAMOND, *et al.*

Appellants,

vs.

CHARLES, *et al.*

Appellees.

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BRIEF AMICUS CURIAE OF U.S. SEN. GORDON J. HUMPHREY (R-N.H.), U.S. SEN. ORRIN G. HATCH (R-UTAH), U.S. REP. CHRISTOPHER H. SMITH (R-N.J.), U.S. REP. ALAN B. MULLOHAN (D-W.VA.) AND CERTAIN OTHER MEMBERS OF THE CONGRESS OF THE UNITED STATES IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICI CURIAE

The amici curiae consist of 82 members of the Congress of the United States, of which are the members of the Senate and members of the House of Representatives, as follows:

Sen. James Abdnor (R-S.Dak.), Rep. Richard K. Armey (R-Tex.), Rep. Robert E. Badham (R-Cal.), Rep. Steve Bartlett (R-Tex.), Rep. Joe Barton (R-Tex.), Rep. Herbert H. Bateman (R-Va.), Rep. Thomas J. Bliley, Jr. (R-Va.), Rep. David E. Bonior (D-Mich.), Rep. Robert A. Borski (D-Pa.), Rep. Beau Boulter (R-Tex.), Rep. Dan Burton (R-Ind.), Rep. William Carney (R-N.Y.), Rep. William W. Cobey, Jr. (R-N.C.), Rep. E. Thomas Coleman (R-Mo.), Rep. Larry E. Craig (R-Idaho), Rep. Phillip M. Crane (R-Ill.), Rep. William E. Dannemeyer (R-Cal.), Rep. Hal Daub (R-Nebr.), Rep. Robert W. Davis (R-Mich.), Rep. Thomas D. DeLay (R-Tex.), Sen. Jeremiah Denton (R-Ala.), Rep. Michael DeWine (R-Ohio), Rep. Robert K. Dornan (R-Calif.), Sen. Dave Durenberger (R-Minn.), Rep. Bill Emerson (R-Mo.), Rep. Jack Fields (R-Tex.), Sen. Phil Gramm (R-Tex.), Sen. Charles Grassley (R-Iowa), Rep. Kenneth J. Gray (D-Ill.), Rep. James V. Hansen (R-Utah), Rep. Thomas F. Hartnett (R-S.C.), Sen. Orrin G. Hatch (R-Utah), Sen. Mark O. Hatfield (R-Oreg.), Rep. Paul B. Henry (R-Mich.). Sen. Gordon J. Humphrey (R-N.H.), Rep. Duncan Hunter (R-Calif.), Rep. Earl Hutto (D-Fla.), Rep. Henry J. Hyde (R-Ill.), Sen. Bob Kasten (R-Wis.), Rep. Jack F. Kemp (R-N.Y.), Rep. Thomas N. Kindness (R-Ohio), Rep. John J. LaFalce (D-N.Y.), Rep. Robert J. Lagomarsino (R-Calif.), Rep. Norman F. Lent (R-N.Y.), Rep. William O. Lipinski (D-Ill.), Rep. Bob Livingston (R-La.), Rep. Tom Loeffler (R-Tex.), Rep. Thomas A. Luken (D-Ohio), Rep. Edward R. Madigan (R-Ill.), Rep. Thomas J. Manton (R-N.Y.), Rep. Nicholas Mavroules (D-Mass.), Rep. Romano L. Mazzoli (D-Ky.), Sen. James A. McClure (R-Idaho), Rep. Clarence E. Miller (R-Ohio), Rep. Alan B. Mollohan (D-W.Va.), Rep. Carlos J. Moorhead (R-Calif.), Rep. Austin J.

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The amici curiae, as Members of the Congress of the United States, are vested by Article II, Section I, of the Constitution, with all legislative power granted in the Constitution. It is their sworn duty and common purpose "to support and defend" the Constitution of the United States.

Under the Constitution, each coordinate branch of the federal government has a duty to insure that the federal government, through each of its branches, maintains and respects the limits on their powers as prescribed by the Constitution. When one branch of the federal government exceeds its proper authority, it is the duty of the other coordinate branches to take measures that are reasonable and prudent to correct this imbalance. Members of Congress share with the other coordinate branches an interest in maintaining this constitutional balance.

The unique interest of the amici curiae in the preservation of these essential principles of the American Constitution is not represented by other parties in this case. Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Supreme Court, in *Roe v. Wade*, 410 U.S. 113 (1973), based its decision on selective and disputable historical data. The Court did not acknowledge the prevailing cultural, legal and medical abhorrence of abortion since recorded history, up to *Roe*. It is the intent of the amici curiae, herein, to supplement the facts, correct the inaccuracies and challenge the interpretation of the historical circumstances in which *Roe* and its progeny have emanated. It is the position of the amici curiae that this Court cannot fully and fairly address the substantive issues in the two cases at bar with the jurisprudential wisdom required of this nation's highest Court without reviewing the premises and rationale of *Roe*.

It is the contention of the amici curiae that the Court exceeded its judicial authority in its finding of a previously unrecognized constitutional right to abortion. Furthermore, the amici curiae respectfully submit that the framers of the U.S. Constitution and of the Fourteenth Amendment did not intend to create a right to abortion. While fully deferring to the Supreme Court's authority to interpret laws, it is the view of the amici curiae that there was insufficient basis for the Court's conclusion in *Roe* that prenatal life was or is beyond the power of the States to protect. Therefore, this honorable Court should uphold the state laws invalidated by the courts below as appropriate exercises of state power to serve its compelling interest to protect prenatal life through legislation and regulation.

ARGUMENT

I.

THE SUPREME COURT'S DECISION IN *ROE V. WADE* IS IN OPPOSITION TO THE HISTORICAL TREATMENT OF ABORTION AT COMMON LAW AND BY EARLY AMERICAN ABORTION LAWS.

The Court's sweeping decision in *Roe v. Wade*, 410 U.S. 113 (1973), which resulted in abortion-on-demand, clearly conflicts with the treatment of abortion at common law, early American abortion laws, and by laws enacted by the state legislatures at the time of the decision. Virtually every historical, medical and legal argument the Court utilized in support of *Roe* has been subjected to intense scholarly criticism.

After reviewing the development of abortion as a crime at common law and relying heavily on the analysis of Professor Cyril H. Means, an advocate of legalized abortion, the Majority in *Roe* concluded.:

> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.

Roe, 410 U.S. at 140.

The Court's conclusions and its acceptance of the common law analysis of Professor Means was clearly contrary to the actual

treatment of abortion at common law, with respect not only to maternal health, but also to the protection of the life of the fetus.

When Justice Blackmun delivered the Court's opinion on January 22, 1973, not a single abortion statute in any State of the Union stood. Even the State of New York, which had one of the most unrestrictive abortion statutes and which allowed abortion on demand through the 24th week of pregnancy,[1] was too restrictive of the abortion right for a majority of the Court.

On the same day that *Roe* was decided, the Court also handed down the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973). The Court stressed in *Roe*, "[t]hat opinion and this one, of course are to be read together." *Roe*, 410 U.S. at 165. In *Doe*, the Court, making reference to its earlier decision in *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971), construed the meaning of "mother's life or health":

> That . . . has been construed to bear upon psychological as well as physical well-being . . . . [T]he medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. All these factors may relate to health.

As a result of these two abortion decisions and their progeny, no State may constitutionally prohibit abortion at any time during pregnancy. After the end of the first trimester (first three months), it may promulgate regulations to protect *maternal* health, but not to impede abortion. After viability, the State may "proscribe" abortion only when the woman considering abortion can find no

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1. N.Y. Penal Law, Section 125.05(3) (1977).

physician willing to verify that her mental health would, for example, be "taxed by child care" or suffer "distress . . . associated with the unwanted child." *Roe,* 410 U.S. at 153. In effect, therefore, as then Yale Law School Professor John Hart Ely has written, "[T]he statutes of most states must be unconstitutional *even as applied to the final trimester* . . . . [E]ven after viability the mother's life *or health* (which presumably is to be defined very broadly indeed, so as to include what many might regard as the mother's convenience . . .) must, as a matter of constitutional law, take precedence over . . . the fetus's life . . . ."[2]

In effect, provided a woman can find a physician willing to perform an abortion, she has a constitutional right to obtain one at any time throughout the nine months of pregnancy, right up to birth.

When the Court finished its recitation of the history of the case and disposed of the procedural questions of justiciability, standing and abstention, it did not approach the substantive issues first. Instead, the Court initiated a lengthy examination of the history of legal and societal attitudes toward abortion. Nearly twice as many pages were devoted to this effort as were to be spent on analysis of the legal issues.

The Court opined that because abortion was fairly freely available and not forbidden by the law until the mid-19th century, it should be recognized as a facet of the liberty the framers of the Fourteenth Amendment intended to protect. This historical discussion, then, must be seen as the foundation for the Court's

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2. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 921 n.19 (emphasis in original) (1973).

holding that the right of privacy found in the U.S. Constitution should encompass abortion.[3]

The Court's recounting of the history of abortion began with ancient attitudes and the Hippocratic Oath. Relying for both sections on the outdated work (1943) and strong views of historian Ludwig Edelstein, the Court surmised that the ancient Greeks and Romans had resorted to abortion with great frequency and that it had met with widespread approval. *Roe*, 410 U.S. at 130. Comprehensive new evidence assembled by the Italian historian Enzo Nardi published in 1971, reveals that temple inscriptions and other ancient writings disclose considerable opposition to abortion in the Greco-Roman world.[4] This evidence has considerable support from other commentators. A comprehensive survey by Stephen Krason and William Hollberg[5] casts skepticism on the Court's interpretation of Plato and Aristotle as unqualifiedly "commending" abortion, cites a number of

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3. Some have found even the Court's version of abortion history to point in the opposite direction from that holding. "The Court . . . seemed to ignore 'the "traditions and collective conscience of our people," ' " wrote one commentator. "[T]he Court's holding was decidedly more lenient than the American attitudes indicated by the legislative trends and professional opinions discussed in the course of its opinion." Comment, *Roe v. Wade and In Re Quinlan: Invididual Decisions and the Scope of Privacy's Constitutional Guarantees*, 12 U.S.F.L. Rev. 111, 142 (1977) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 493 [1965], quoting *Powell v. Alabama*, 287 U.S. 45, 67 [1932]). See also Regan, *Rewriting Roe v. Wade*, 77 U. Mich. L. Rev. 1569, 1621 (1979), ("[T]he Court has rarely overturned as much history all at once as it did in *Roe v. Wade*. That surely ought to give us pause.").

4. Nardi, *Procurato Aborto Neo Mondo Greco Romano*, (1971).

5. S. Krasson & W. Hollberg, *The Law and History of Abortion: The Supreme Court Refuted*, 4-7 (1984). But see Special Project, *Survey of Abortion Law*, 1980 Ariz. St. L.J. 67, 77.

prominent Greeks and Romans who condemned abortion,[6] and points out that according to a text ascribed to Galen, Sparta under Lycurgus and Athens under Solon prohibited abortion.[7] Harold Brown and Krason and Hollberg observe that Roman law banned abortion beginning with the reign of the Emperor Augustus.[8]

Except for their observation that the Persian Empire banned abortion, the Court's survey of the ancient world was limited to Greece and Rome. *Roe,* 410 U.S. at 130. Yet surely it is noteworthy that abortion was condemned by the twelfth century B.C.E. (Before Common Era) Assyrians,[9] by the Hittites,[10] by the early Hindus[11] and Buddhists of India and by Indian law. There is some indication that the ancient Egyptians held similar views.[12] Most of these facts were available to the *Roe* Court in the epical work of Eugene Quay.[13] The Court knew of Quay, for the opinion cited

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6. Krasson & Hollberg, *supra*, note 5, at 4, 8. See also Special Project, *supra* note 7, at 81-82.

7. *Id.* at 8, following Brown, *What the Supreme Court Didn't Know: Ancient and Early Christian Views on Abortion*, Hum. L. Rev., Spring 1975, at 5, 11.

8. Brown, *supra*, note 7, at 14: Krasson and Hollberg, *supra*, note 5, at 8.

9. Brown, *supra*, note 7 at 7: Krasson and Hollberg, *supra*, note 5, at 2; Special Project, *supra*, note 5, at 75.

10. Brown, *supra*, note 7, at 8; Krasson and Hollberg, *supra*, note 5, at 2; Special Project, *supra*, note 5, at 74 and n. 6.

11. Krasson and Hollberg, *supra*, note 5, at 2; Special Project, *supra*, note 5 at 74 and n. 8.

12. *Id.*; Special Project, *supra*, note 5, at 73-74 and nn. 3-4.

13. Quay, *Justifiable Abortion - Medical and Legal Foundation* (Pt. 2), 49 Geo. L.J. 395 (1961).

him, *Roe*, 410 U.S. 130, n.9., but the Court incorporated none of this historical evidence into its opinion.

The Court itself recognized that the Oath of Hippocrates, composed in ancient Greece, prohibited members of what would become the medical profession to practice abortion. This Hippocratic Oath, until recently, was recited by the graduates of nearly every medical school as they formally became physicians. The Court raised this matter *sua sponte,* because, it wrote, "Although the Oath is not mentioned in any of the principal briefs in this case or in [the companion case of] *Doe v. Bolton* . . . , it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day." *Roe*, 410 U.S. at 131.

The Court did not fill in the gap between ancient attitudes and the Hippocratic Oath up to the Anglo-American common law. During this period, the ethics and law of Western civilization were dominated by the Judeo-Christian perspective, both of which had long opposed abortion, with minor exceptions. The first century C.E. (Common Era) Didache, known as the "Teaching of the Twelve Apostles," proclaimed to the early Christian Church, "You shall not slay the child by abortions. You shall not kill what is generated."[14] Similar declarations were made in other early Christian writings, such as the Epistle of Barnabus and the Apocalypse of Peter.[15] In the West, the Fathers of the Church, from second century Clement of Alexandria, through Tertullian and Jerome to Augustine, denounced abortion.[16] In the East, St. John Chrysostom and St. Basil of Cappadocia spoke out against

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14. J. Noonan, *An Almost Absolute Value in History*, in *The Morality of Abortion: Legal and Historical Perspective* 1, 9 (J. Noonan ed. 1970).

15. *Id.* at 10.

16. *Id.* at 11-16.

abortion.[17] These early teachings were finalized in the prohibitions of penitentials and of canons enacted by synods and councils, which in turn surfaced into the law of the state, such as the Frankish kingdom of Charlemagne.[18] A canon law decretal of Gregory IX coupled the penalty for abortion with that for means of sterilization: of both it was said, "[L]et it be held as homicide."[19] This treatment of abortion, together with contraception, as crimes demanding severe punishment was combined with a general view that abortion, although punished as such, was not "true" homicide until the fetus was "ensouled," which was believed to occur at formation or quickening.[20] That distinction, taken from Aristotle, was introduced by theologians in the fifth century,[21] and was the prevailing view until the seventeenth century. Aristotle's theory, which came to be called "delayed animation," was essentially one of biological metamorphasis.

In the early 13th century, Henry De Bracton wrote that abortion by blow or poison was homicide if the fetus was "already formed and animated, and particularly if it be animated."[22] Another authority later in that century, Fleta, also condemned

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17. *Id.* at 17.

18. *Id.* at 18.

19. *Decretals* 5.12.5, quoted in Noonan, *supra*, note 14, at 21.

20. For a careful and comprehensive history of the attitude of medieval Christendom toward abortion, see J. Connery, *Abortion: The Development of the Roman Catholic Perspective* (1977).

21. Special Project, *supra*, note 5, at 84.

22. 2 H. Bracton, *De Legibus et Consuetudinibus Angliae* 279 (T. Twiss ed. 1879).

abortion of a "formed and animated" fetus as homicide.[23] At that time, biologists taught that a new life came into being when the fetus assumed recognizable human form, which was thought to occur forty days after conception.[24]

The impossibility of proving the cause of the unborn child's death was a difficulty encountered with the common law crime of abortion. This evidentiary problem led to a paucity of indictments for abortion. As a result, some sixteenth century writers concluded that, as a practical matter, abortion was not a crime.[25] Seventeenth century abortion reformers tried to resolve the proof problem by declaring that an abortion was murder if the child was born alive with marks of the abortion and then died. If the child was stillborn, there was no murder because it could not be known "whether the child was living at the time of the batterie or not, or if the batterie was the cause of the death . . .*R. v. Sims,* 75 Eng.Rep.1075 (K.B.1601). Chief Justice Sir Edward Coke, the great sixteenth and seventeenth century jurist who successfully fought to capture for common law courts most of the jurisdiction of ecclesiastical courts, attempted, later in the 17th century, to resolve the problem further, and, in so doing, indicated once again the concern common law attached to the life of the fetus:

> If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body,

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23. See Quay, *supra*, note 13, 431.

24. See Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1644-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 411-12 (1968).

25. See Davies, *Child Killing in English Law*, 1 Modern L. Rev. 203 (1937).

> and she is delivered of a dead childe this is a great misprision, and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in the law it is accounted a reasonable creature, in *rerum nature,* when it is born alive.[26]

In *Roe*, the Court, relying on Professor Means' interpretation of two cases from 1327 and 1348 (three centuries before Coke's writings), suggested that Coke was either mistaken or intentionally misstated the status of abortion as a common law crime. *Roe*, 410 U.S. at 134. Other commentators, such as Robert Byrn[27], Joseph Dellapenna[28] and Robert Destro[29], strongly dispute Means' analysis of those cases and suggest that the cases stand for the opposite conclusion. The great common law scholars clearly indicated that abortion was a crime with respect, at the very least, to a quick fetus.

Finally, as Blackstone indicated, the common law recognized the life of the fetus at the time of quickening. Yet Means, and consequently, the *Roe* Court, dismissed Blackstone, whose name was synonymous with "law" for eighteenth and nineteenth century American lawyers, as an uncritical follower of Coke. Blackstone's work, which must have been familiar to framers both of the

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26. E. Coke, *Institutes III**50 (1644).

27. Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford. L. Rev. 807, 815-27 (1973).

28. Joseph Dellapenna, *The History of Abortion: Technology, Morality, and the Law*, 40 U. Pitt. L. Rev. 359 (1979).

29. Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250 (1975).

Constitution and of the Fourteenth Amendment, called it a "great misprision" "[t]o kill a child in its mother's womb."[30]

From treatment of the common law, the *Roe* Court moved to a description of the nineteenth-century statutory enactments on abortion, both in England and in the United States.

The first English abortion statute, recognizing this understanding of human generation, provided for greater penalties for an abortion of a woman "quick with child" than a woman "not being, or not being proved to be, quick with child."[31] These provisions were superseded in a new statute, enacted in 1837, which imposed a penalty for all abortion acts without distinction.[32] A possible motive for this change was the discovery of the ovum, and thus a more accurate idea of the nature of conception, in 1827.

The abortion law in effect in this country, in most states, until the mid-19th century, was derived from English common law. *Roe*, 410 U.S. at 138. While the vast majority of states retained the common law distinction that abortion before quickening was not a crime, no state recognized non-criminal abortion after quickening.[33] Later in the 19th century, several states interpreted the common law to mean that abortion was a crime if it occurred at any time during pregnancy, e.g., *Mills v. Commonwealth*, 13 Pa. 630 (1850).

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30. 4 W. Blackstone, *Commentaries* *198.

31. 43 Geo. 3, c. 58, Section 2 (1803).

32. 7 Will. 4 & 1 Vict., c. 85 (1837).

33. Byrn, *supra*, note 27.

Almost all of the states enacted abortion statutes during the 19th century.[34] Connecticut adopted the first state abortion statute in 1821.[35] The Connecticut statute retained the quickening distinction for the abortion crime. Quickening, however, soon began to disappear as the practical standard to determine criminality. The intention behind enactment of these statutes is illustrated by the Maine Supreme Court which, in interpreting the Maine statute, abrogated the quickening requirement in the abortion crime. The court pointed out that if the pleading did not allege the destruction of the child, it would be fatally defective for not charging the essential element of the crime. *State v. Smith,* 33 Me.48 (1851).

The *Roe* Court insisted that when the application of criminal law was statutorily pushed back to the moment of conception in the nineteenth century, it was done not to protect prenatal life but to protect maternal health against the danger of unsafe operations. *Roe*, 410 U.S. at 151-152. In doing so, it completely failed to mention the important scientific developments that promoted the statutory changes. Although sperm was discovered in 1677, the mammalian egg was not identified until 1827. During the next several decades, the cell was recognized as the structural unit of living organisms and the egg, along with sperm, was determined to be cells. It was these breakthroughs in biological research that persuaded the medical community, and the lawmakers and public who relied on their findings, that the human

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34. See *Roe v. Wade*, 410 U.S. 113, 175-76, nn. 1 and 2 (1973) (J. Rehnquist dissenting).

35. Conn. Stat. Tit. 20, Section 14 (1821).

development concepts embodied in their laws were outmoded and hence, in need of major revisions.[36]

About 1857, a "physicians' crusade" was led by the American Medical Association to enact laws protecting the unborn from the moment of conception.[37] In 1859, the American Medical Association Committee on Criminal Abortion criticized the quickening distinction in criminal abortion laws for the "grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being," and called upon state legislatures to revise their abortion laws.[38] The AMA position was not unnoticed because during this period many states abolished the requirement that an abortion had to follow quickening to be a crime. At the time of the ratification of the Fourteenth Amendment in 1868, at least 28 of the 37 states had made abortions before quickening a crime.[39] In the next 15 years, seven more of these States criminalized pre-quickening abortional acts.

The *Roe* Court omitted these developments — an extraordinary exclusion in light of its quotation, in *Roe*, of

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36. The Human Life Bill: Hearing on S. 158 Befoe the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 474 (comm. print 1981) (statement of Victor Rosenblum, Professor of Law, Northwestern Univ): see also Dellapenna, *supra*, note 28, 402-404.

37. J. Mohr, *Abortion in American, The Origins and Evolution of National Policy, 1800-1900*, at 200 (1978).

38. 12 *Transactions of the Am. Med. Assn.* 73-78 (1859).

39. Quay, *supra*, note 13 at 447-520. See *Gray v. State*, 77 Tex. Cr. R. 221, 224, 178 S.W. 337, (1915) (construing abortion statute to abrogate the common-law quickening distinction).

statements from the principal resolutions of the AMA during the "physicians' crusade." *Roe*, 410 U.S. at 141-42.

Further evidence that at least one motivation behind these laws was the protection of the life of the fetus, is seen in several court decisions interpreting these statutes. For instance, an Oklahoma case held that its anti-abortion statutes were enacted and designed for the protection of the unborn child and through it, society. *Bowlan v. Lunsford*, 76 Okla. 115 (1936).

Between 1967 and 1972, most of the state legislatures considered revising their abortion laws. Nineteen states made changes in their abortion laws to permit abortion in an effort to prevent serious health damage to the mother.[40] In addition, some of the states permitted abortion when the unborn child was conceived as a result of rape or incest, or where the child would be born with substantial deformity. Four states required no grounds at all. But all states limited abortions in terms of age of the fetus. For example, Washington had a limit of four lunar months.

The other thirty-one states did not change their abortion law, despite the fact that abortion legislation was introduced in most of them. In two states, Michigan and North Dakota, proposed liberalized abortion statutes were rejected by referendum — by majorities of 61% and 77%, respectively. In twenty-one of the states, the abortion statutes in effect in 1868 (the year the Fourteenth Amendment was ratified) were still effective at the time of the *Roe* decision. *Roe* 410 U.S. at 176, note 2 (dissenting opinion).

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40. Knecht, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*. 1972 U. of Ill. L.F. 177.

In sum, no state, including the four states which allowed abortion-on-demand, made abortion legal for the entire nine months. None of the states had abortion laws as expansive as that created by the Court in *Roe v. Wade*.

The amici respectfully submit that the protection of human life is the foremost duty of government. The Declaration of Independence asserts that all men are endowed with an inalienable right to life, and that it is in order to secure this right that governments are instituted among men. This principle is epitomized in the words of a Founding Father, Thomas Jefferson, who exhorted that "[t]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government".[41] Honoring this commitment, the Constitution provides in both the Fifth and Fourteenth Amendments that no person may be deprived of life without due process of law.

This Court, through its duty to interpret the law, should uphold this commitment to protect human life.

II.

THE FRAMERS OF THE CONSTITUTION AND OF THE FOURTEENTH AMENDMENT DID NOT INTEND TO CREATE A RIGHT TO ABORTION.

There is no ascertainable support in the legislative history of the Constitution to warrant the conclusion that it was intended to secure a "right to an abortion.[42] The Court's discussion of

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41. Speech to the Republican Citizens of Washington County, Maryland (March 31, 1809), reprinted in J. Bartlett, *Familiar Quotations*, 472-73 (14th ed. 1968).

42. Ely, *supra*, note 2, at 939.

the history of abortion regulation, *Roe*, 410 U.S. 113, 129-152, likewise offers no support for the finding within the Fourteenth Amendment of a right to abortion. Nevertheless, *Roe* declares that the Due Process Clause of the Fourteenth Amendment confers a right of privacy which includes the right of a woman to abort her offspring if she so chooses. The decision does not contain a comprehensive discussion of abortion and its relation to the right to privacy. Despite its confidence that somewhere in the Constitution there is a right to abortion, the Court is unwilling or unable to determine the boundaries of the privacy right, saying only that the Constitution does not confer "an un limited right to do with one's body as one pleases." *Roe*, 410 U.S. at 153. Yet if the right of privacy does not entitle one to do with one's own body what one pleases, how can it be extended to protect activity that terminates the life of what would certainly be another human being?

In the absence of an elaboration, it can be concluded that the Court felt that the *Roe* holding is sufficiently supported by the detriment imposed upon the pregnant woman by statutes which prohibit her from aborting her child. While the gravity of this detriment should be appropriately weighed, the Court obviously believes that other important factors, such as spousal consent, are not relevant. Even though the Court, in *Roe*, acknowledged that there is no unrestricted "right to privacy," *Roe* places no effective restrictions on a woman's right or ability to obtain an abortion under the privacy right. All this, however, has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests.[43] Whatever one's viewpoint is on the abortion issue, it is generally agreed that the Constitution does not provide such an unrestrictive "right to privacy."[44]

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43. *Id.*, at 932.

44. *Id.*

III.

THERE IS NO BASIS FOR THE SUPREME COURT'S CONCLUSION IN *ROE* THAT PRENATAL LIFE IS BEYOND THE POWER OF THE STATE TO PROTECT.

The discussions in *Roe v. Wade* of the physiological and legal status of the fetus is the most crucial part of the opinion. The question of when life begins, the Court says, is beyond the competence of the judiciary to answer. *Roe,* 410 U.S. at 159. Nevertheless, the Court effectively answers that question for the legislatures and citizens of fifty states, declaring that the States may only protect unborn life after "viability." Therefore, human life, in the sense of an individual whose rights may be protected by the community, does not begin until at least the seventh month of pregnancy. Indeed, all existence prior to live birth is here given the status of, at most, "potential" life. *Doe v. Bolton* held that the "potential" life of even a viable unborn child cannot be regarded as comparable, under the law, to the emotional or social "health" of his or her mother. *Doe,* 410 U.S. at 192.

The Court offers two reasons for its deduction "that the word 'person' as used in the Fourteenth Amendment does not include the unborn": (1) that uses of "person" elsewhere in the Constitution do not have a prenatal application; *Roe*, 410 U.S. at 157, and (2) that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today." *Roe*, 410 U.S. at 158.

The first reason is unpersuasive because in none of the clauses cited by the Court does the Constitution attempt to define what a "person" is. These provisions, which include the eligibility requirements for Federal office, the apportionment of representatives, the Extradition and Fugitive Slave Clauses of Article IV, act only to restrict a broad class of persons for

particular purposes. This is exemplified by the requirement that a person must be 25 to be a Representative, 30 to be a Senator and 35 to be President. These clauses, as Professor John D. Gorby of the John Marshall School of Law has explained, suggests "only that there are persons, 24 years of age and younger, who are not qualified for the House, Senate or Presidency."[45] They do not imply that those less than 24 years of age are non-persons, nor do they suggest when 24 year-olds become persons, or that they have become persons at birth or at any other particular stage of their development. The Court's essay on this subject offers little convincing proof to support its conclusion that "person" in the Fourteenth Amendment applies only post-natally.

The Court indicates that no case has specifically held the unborn to be persons under the Fourteenth Amendment. *Roe*, 410 U.S. at 158. Yet the Justices should have been aware that the question of the constitutional status of the unborn was before the Supreme Court for the first time. Thus, the Court was able to avoid addressing the issue of fetal personhood by citing a lack of controlling precedent. The failure to address the question more fully is difficult to understand if, as the Court opined, the appellant's case would collapse if the unborn were held to be persons.

Finally, there is ample reason to believe that the Court's belief in the relative availability of legal abortion during the 19th century is factually inaccurate. Leading authorities are in agreement that it was a common law crime to administer any drug or perform any operation for the purpose of causing a miscarriage, unless

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45. See Gorby, *The 'Right' To An Abortion, The Scope of the Fourteenth Amendment 'Personhood', and the Supreme Court's Birth Requirement*, 1979 So. Ill. L. Rev. 1, 11-12.

such operation were necessary to save the life of the woman.[46] During the 19th century, Americans gradually codified and strengthened the common law prohibition of abortion,[47] and as Justice Rehnquist noted in his dissenting opinion, at the time of the adoption of the Fourteenth Amendment in 1868, "there were at least 36 laws enacted by state or territorial legislatures limiting abortion." *Roe*, 410 U.S. at 174-176. At least 19 of these had been passed by 1850. Nevertheless, the Court "observ[ed] . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today." *Roe*, 410 U.S. at 158.

The Court's holding that the Fourteenth Amendment could not possibly have been intended to protect the unborn may conflict with the plain meaning of the word "person," and quite possibly, with the intent of the Fourteenth Amendment. In order to decide whether an individual is protected under the Fourteenth Amendment, Congressman John Bingham of Ohio, its principal Framer, declared in 1867, "the only question to be asked of the creature claiming its protection is this: Is he a man?"[48] The Court's observations notwithstanding, this question has consistently been answered in the affirmative by American courts and legislatures with regard to the unborn.[49]

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46. R. Perkins, *Criminal Law* 140 (2nd ed., 1969) See generally, Horan et. al, *The Legal Case for the Unborn Child*, in *Abortion and Social Justice*, 105 (1972).

47. Destro, *supra*, note 29, 1278-80.

48. Cong. Globe, 40th Cong., 1st Sess. 542 (1867).

49. In 1850, the Supreme Court of Pennsylvania declared, "By the well settled and established doctrine of the common law, the civil rights of an infant en ventre sa mere are fully protected at all periods after conception." *Mills v. Commonwealth*, 13 Pa. 630, 631 (1850). See also *State v. Murphy*, 27 N.J.L. 112, 114 (1858) (the mother's offense in procuring an abortion "at the common is against the life of the child"); *Smith v. State*, 33 Me. 46 (1851).

Thus, the Court's finding of non-personhood of the unborn was a fleeting one. In any event, this finding does not mandate the Court's conclusion that the States lack any compelling interest in protecting the lives of these unborn.

The theme of "personhood" was further discussed by the Court in its observation that the unborn were not considered "persons in the whole sense" under the common law. *Roe*, 410 U.S. at 162. This observation is as tenuous as the Court's denial of personhood under the Constitution. The Court did not take note of the history of abortion restrictions in perspective—with abortion first as a violation of canon and common law, then, after the demise of canon law jurisdiction over civil matters,[50] as a common law crime, and as a statutory offense.

The phrase, "persons in the whole sense," is not inclusive. Many categories of human beings were not given full rights under the common law—for example, infants, women and slaves. Yet it does not follow that the common law did not protect the lives of these human beings. At common law, the unborn were the beneficiaries of personhood rights in some circumstances. For example, the Court acknowledged that unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians.[50]

In the realm of tort law, the uninterrupted trend of recent decades has been to discard the old rules and to allow the unborn child standing to sue for injuries sustained in utero. Dean Prosser has noted that,

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50. O'Meara, *Abortion: The Court Decides a Non-Case*, 1974 Sup. Ct. Rev. 337, 355. See e.g. *Byrn v. New York City Health and Hospital Corp.*, 31 N.Y. 2d 194, 286 N.E. 2d 288, (1972).

> All writers who have discussed the problem have joined in condemning the old rule, and in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother.[51]

Thus, in terms of the law's development, the Court would have placed itself well within the mainstream by recognizing, under some circumstances, that the unborn have some type of "personhood" status. Instead, it did not even acknowledge this trend.

It is important to distinguish between *Roe v. Wade's* holding regarding the personhood of the unborn under the Fourteenth Amendment and the Court's subsequent discussion of theories on when life begins. On the first question, the Court squarely held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe*, 410 U.S. at 158. This conclusion disposed of any argument that the State might be permitted or obligated under the Amendment to protect the life of the unborn.

The second argument proposed by the State defendants in *Roe v. Wade* was that, apart from any duty under the Fourteenth Amendment, the State has a compelling interest in protecting life "from and after conception." *Roe*, 410 U.S. at 159. The Court's response was philosophical:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus the judiciary, at this point in the development of man's

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51. W. Prosser, *The Law of Torts*, 336 (4th ed. 1971)

knowledge, is not in a position to speculate as the the answer. *Id.*

After *Roe*, only one theory of prenatal life is reflected in American constitutional law: that life is worth protecting only after viability, when the fetus "has the capability of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163. It is only at this point, fixed elsewhere in the opinion at about 24-28 weeks, *Id.* at 160, that a State may even begin to balance its interest in the life of the fetus against the social or emotional "well being" of the mother. This conclusion rests upon the Court's determination that until birth, "the fetus, at most, represents only the potentiality of life." *Id.* at 162. No other "theory of life," the Court holds, may be adopted by the states to limit the right to abortion. *Id.*

The Court examines the various historical views of when human life begins, and notes that many of these disagreed with the view that life begins at conception. *Roe,* at 160. In effect, the Court decided that the State may only enforce a theory of life that is consistent with the view that life begins at viability. The Court's determination, for purposes of the law, of when life begins and its division of the same in three fetal stages represents an arbitrary solution to implement a compromise to an uncompromisable situation. Again, regardless of one's views on the abortion issue, the Court's review of *Roe* cannot be characterized as mere interpretation of the Constitutional text.

IV.

THE SUPREME COURT, IN *ROE V. WADE*, EXCEEDED ITS SCOPE OF AUTHORITY WHEN IT CREATED A CONSTITUTIONAL RIGHT TO ABORTION.

There has been a great deal of jurisprudential criticism directed at the *Roe* and *Doe* decisions. Most of this criticism has

come from legal scholars who do not look with disfavor upon the substantive policies generated by these decisions. The question is how these results could emanate from and be mandated by a Constitution that had never been thought prior to 1973, to contain the "rights" set forth in *Roe* and *Doe*.

Among constitutional scholars who have been sharply critical of the jurisprudence in *Roe* are the late Alexander Bickel of the Yale Law School, Arthur Miller of the Harvard Law School, Harry Wellington, former Dean of the Yale Law School and Archibald Cox, former Solicitor General of the United States.[52]

Roe, like other controvertible Supreme Court decisions, reflects the anomaly of the American legal system. In an effort to account for some flexibility, the Court allowed for scientific advances so that later decisions could be adjusted accordingly. In spite of the plethora of medical and biological achievements in the twelve and a half years since *Roe*, the Court has not substantively altered its original holding. Nevertheless, the Court's decision can only be modified by self-initiative or by the long and arduous process of constitutional amendment. Consequently, *Roe* has attained a degree of permanency possibly not even envisioned by its authors.

The Court's division of the human gestational period into three trimesters is representative of *Roe's* arbitrary solution to the abortion rights question. The Court never substantiates its perceived need to dissect the State's interest to correspond with its three trimester formula. Despite the appearance of what some argue is an equitable balancing of rights and interests, the practical

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52. A. Bickel, *The Morality of Consent* (1975); A. Miller, *Miller's Court* (1982); Wellington, *Common Law Rules and Constitutional Double Standards*, 83 Yale L.J. 221, 303 (1973); A. Cox, *The Role of the Supreme Court in American Government* (1976).

result yields a nullity for an effective State interest. The Court ensured that most abortions could and would occur well before any meaningful application of State power. Certainly, even under the most liberal construction of jurisprudence, this amounts to a *non sequitur.*

CONCLUSION

"Stare decisis et non quieta movere" — "to stand by what has been decided and not disturb what is at rest."[53]

This doctrine of *stare decisis* favors reliance on precedent and discourages overruling cases. However, incorrectly-decided constitutional questions are never quiet nor at rest. The landmark cases[54] which have been overturned were done so because their legal foundations were infirm. The Court has shown, in its jurisprudential wisdom, its willingness to reconsider the merits of earlier decisions based on new findings and unintended consequences of the original case.

Roe v. Wade is one such case ripe for reevaluation. Additional information is now available to the Court, not only through significant technological advances, but there is no evidence or indication that the *Roe* Court foresaw the occurrence of abortion on such a massive scale. This Court should not stand by what has been decided, for it was not correctly decided by jurisprudential standards, and as the issues in the matters subjudice indicate, there has been no rest for the *Roe* decision.

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53. See McKay, *Stability and Change in Constitutional Law*, 17 Vand. L. Rev. 203, 213 (1963). McKay renders "*quieta*" as "what is established." "What is at rest" seems to be more accurate.

54. For example, see *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Lochner v. New York*, 198 U.S. 45 (1905).

Wherefore, the amici curiae pray that this Court reverses the Third Circuit Court of Appeals and reevaluates its original findings in *Roe*, for the reasons stated herein.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, ET AL., APPELLANTS

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ET AL.

EUGENE F. DIAMOND, ET AL., APPELLANTS

v.

ALLAN G. CHARLES, ET AL.

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ET AL.

No. 84-1379

EUGENE F. DIAMOND, ET AL., APPELLANTS

v.

ALLAN G. CHARLES, ET AL.

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE UNITED STATES

These cases involve the efforts of two state legislatures to balance the competing interests at stake in the abortion decision. Congress has in the past enacted legislation affecting that decision (see 42 U.S.C. 300a-6; Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 926), and may do so again. This Court's continuing effort to define the perimeters of permissible abortion regulation has a direct impact upon the ability of the country's elected representatives—both state and federal—to deal with this important question of great public import and heated political debate.

SUMMARY OF ARGUMENT

The opinions of the courts below are multiply flawed. In their manifest eagerness to strike down the state statutes in question they transgress numerous canons of constitutional adjudication: provisions are construed so as to impugn rather than save their constitutionality; facts stipulated solely for purposes of a preliminary injunction are taken as dispositive for an ultimate judgment on the statute; and provisions repealed and substantially recast to meet constitutional objections are struck down in their earlier versions. More substantively, the courts below reach their conclusions as if this Court in *Roe* v. *Wade* had posited only one value, a woman's unfettered right to an abortion, rather than a balance of values which include the state's interest in maternal health and in unborn and future life. The harsh and one-sided nature of the decisions below may in part be a response to a change in emphasis in this Court's opinion in *Akron* v. *Akron Center for Reproductive Health*, which itself expressed considerable impatience with legislative attempts to balance the interests recognized in *Roe* v. *Wade*. To the extent this is so, these cases and *Akron* itself are not just wrong turns on a generally propitious journey but indications of an erroneous point of departure. Indeed, the textual, doctrinal and historical basis for *Roe* v. *Wade* is so far flawed and, as these cases illustrate, is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it.

DISCUSSION

A. In *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), this Court held that the "right of privacy" emanating from the Due Process Clause "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." But the Court has consistently rejected the notion that "the Constitution requires abortions on demand" (*id.* at 208 (Burger, C.J., concurring)). Rather, the Court has held, in this and other contexts, that the right of privacy "is not unqualified and must be consid-

ered against important state interests in regulation" (*id.* at 154).

Perhaps the dominant governmental interest recognized in the Court's opinions is the state's "unquestionably strong and legitimate interest in encouraging normal childbirth," an interest that "exist[s] throughout the course of the woman's pregnancy" (*Beal* v. *Doe*, 432 U.S. 438, 446 (1977)). And the Court has consistently recognized that the state has "an important and legitimate interest," which likewise exists throughout pregnancy, in safeguarding the health of the mother and in maintaining medical standards. *E.g.*, *Roe* v. *Wade*, 410 U.S. at 154; *Doe* v. *Bolton*, 410 U.S. 179, 194-195 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 80-81 (1976).

In evaluating state efforts to further these legitimate interests, this Court and its individual Justices have said that a regulation "is not unconstitutional unless it unduly burdens the right to seek an abortion." *E.g.*, *Maher* v. *Roe*, 432 U.S. 464, 473 (1977) (original quotation marks omitted). Indeed, the Chief Justice has stated his understanding that "[t]he Court's holdings in *Roe* v. *Wade* * * * and *Doe* v. *Bolton* * * * simply require that a State not create an absolute barrier to a woman's decision to have an abortion" (*Maher* v. *Roe*, 432 U.S. at 481 (Burger, C.J., concurring)).

The decisions below are inconsistent with these principles and should be reversed. The courts of appeals betrayed unabashed hostility to state regulation of abortion and ill-disguised suspicion of state legislators' motives. The courts repeatedly failed "to give proper weight to the legislative decision, as expressed in the statute, to protect the life and health of the woman and the child subject to abortion" (84-495 J.S. App. 170a (Weis, J.)). A persistent theme of the decisions below is "the notion that normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion" (*Danforth*, 428 U.S. at 98 (White, J., concurring and dissenting)). The decisions below thus not only "have far-reaching effects"

on the abortion issue, but also "implicate the proper role of the states and the federal courts" under our Constitution (84-495 J.S. App. 172a-173a (Weis, J.)).

1. *No. 84-495.* The Third Circuit signaled its antipathy in the opening section of its opinion, in which it imputed to the Pennsylvania legislature "a pervasive invalid intent" to "restrict a pregnant woman's fundamental right to choose an abortion" (84-495 J.S. App. 31a, 32a). The court suggested that the legislature was somehow culpable for enacting "a complex and extensive regulatory scheme * * * containing numerous provisions which it had been advised skirted constitutional limits" (*id.* at 86a). The court faulted the legislature for passing the abortion bill "after scant debate" (*id.* at 13a) and for attaching it to another bill the court did not view as "germane" (*id.* at 12a & n.3). The court relied heavily (*id.* at 12a-13a) on newspaper accounts about a cosponsor's alleged opposition to *Roe* v. *Wade*. And even though the case was on appeal from the district court's denial of a preliminary injunction,[1] the court of appeals reached out to render a final judgment holding most of the statute unconstitutional, asserting that "[t]he customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review" (84-495 J.S. App. 21a).

The court's zeal to place the worst possible construction upon the Pennsylvania statute is evident from its treatment of the specific provisions challenged. That treatment is seriously at odds with this Court's abortion opinions and with basic principles of judicial review.

a. Section 3206(c) provides that a pregnant minor, without seeking parental consent, may petition the appropriate court to authorize an abortion upon a finding that she "is mature and capable of giving informed consent * * * and has, in fact, given such consent" (18 Pa. Cons. Stat. Ann. (Purdon 1983)). This provision codifies the holding in *Bellotti* v. *Baird* (*Bellotti II*), 443

[1] The district court had granted a preliminary injunction as to one section of the statute, but the State conceded the invalidity of that section on appeal (84-495 J.S. App. 18a, 33a-34a).

U.S. 622, 648-651 (1979). The statute provides that such court proceedings "shall be confidential and shall be given such precedence * * * as will ensure that the court may reach a decision promptly and without delay" (§ 3206 (f)). The judge must rule "within three business days of the date of application" (*ibid.*). The statute mandates an "expedited confidential appeal" if authorization is denied and directs the Pennsylvania Supreme Court to issue "such rules as may be necessary to * * * ensure confidentiality and * * * promptness of disposition" (§ 3206 (h)).

The court of appeals "d[id] not invalidate section 3206" (84-495 J.S. App. 56a). The court nevertheless proceeded to enjoin the statute's enforcement "until the state promulgates [the] regulations" referred to above (*ibid.*). This Court has made it clear, however, that a state is not constitutionally required to have regulations on this subject, expressing confidence that state courts will expedite cases involving minors' consent consistently with this Court's decisions. *Bellotti II*, 443 U.S. at 645 & n.25. Accord, *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 491 n.16 (1983). The court of appeals' action in enjoining enforcement of a state law, without any finding that it contravenes federal law or the federal Constitution, is unprecedented and remarkable.

b. Section 3210(c) requires the attendance of a second physician at abortions performed after viability. This provision, like the provision at issue in *Ashcroft*, contains no explicit exception for medical emergencies (see 462 U.S. at 485 & n.8). The Court in *Ashcroft* inferred such an exception under the latter statute and held it valid (*ibid.*). The court of appeals refused to infer a comparable exception under Section 3210(c) here. It did so even though Section 3210(a) provides a "complete defense to any charge brought against a physician for violating the requirements *of this section* * * * that the abortion *was necessary to preserve maternal life or health*" (emphasis added). The court justified its holding by asserting that subsections (a) and (c) are "separated by [an] intervening provision [viz., subsection (b)]

which on its face evinces the Pennsylvania legislature's unconstitutionally restrictive view of maternal health" (84-495 J.S. App. 73a). The court's insistence that the statute be construed so as to create rather than to remove constitutional problems inverts well-established canons of judicial review.

c. Section 3210(b) provides that the method of abortion used when the fetus is viable must be the one most likely to produce a live birth, unless that method would cause a "significantly greater" risk to the mother. The district court, in an effort to discharge its "oblig[ation] to give the statute [a] reasonable interpretation which avoids the danger of constitutional invalidity" (84-495 J.S. App. 247a-248a), interpreted "significantly greater" to mean "medically cognizable," and held the statute as thus interpreted valid under *Colautti* v. *Franklin*, 439 U.S. 379, 400 (1979). The court of appeals refused to adopt this construction, finding it "inconsistent with * * * the legislative intent," and accordingly declared the statute unconstitutional (84-495 J.S. App. 79a). It did so even though the district court had shown that its saving construction was supported by a dictionary definition of the relevant words (*id.* at 248a). And it did so without even considering the possibility of abstaining to ascertain whether the Pennsylvania courts might adopt the same construction that the district court did.

d. Section 3208, entitled "Printed Information," directs the Pennsylvania Department of Public Health to publish easily comprehensible pamphlets describing assistance available to pregnant women through public and private agencies. These pamphlets are to include the following statement: "The Commonwealth of Pennsylvania strongly urges you to contact [these agencies] before making a final decision about abortion" (§ 3208(a)(1)). The statute also directs the Department to publish literature discussing the unborn child's probable anatomical characteristics and possibility of survival, provided that such material is "objective, nonjudgmental and designed to convey only accurate scientific information" (§ 3208(a)(2)).

The court of appeals declared this statute unconstitutional (84-495 J.S. App. 58a-59a). It did not base this holding on a determination that the section, standing alone, was invalid. Indeed, such a determination would contravene this Court's ruling that a state may "make a value judgment favoring childbirth over abortion, and * * * implement that judgment by the allocation of public funds" (*Maher* v. *Roe*, 432 U.S. at 474). The court of appeals based its holding, rather, on a determination that Section 3208 was "inextricably intertwined" (84-495 J.S. App. 58a) with another section which the court thought unconstitutional. The sole link between the two sections is a statutory cross-reference (see *id.* at 137a (Seitz, C.J., dissenting)). The court invalidated Section 3208 based on this supposed "inextricable" connection even though the law contains an explicit severability clause (*ibid.*). The court's approach is unjustifiable and can only be explained as an attempt to censor printed matter the majority did not like.

e. Section 3205, entitled "Informed Consent," provides that a woman's consent to abortion will be deemed "voluntary and informed" only if the referring or the attending physician provides her with information about the relative medical risks, both physical and psychological, of abortion and childbirth. The doctor or his agent must also inform the woman of the availability of certain financial assistance and social services in the event of childbirth (§ 3205(a)(2)(i) and (ii)). Finally, the doctor or his agent must inform the woman that she has a right to review, but need not review, the printed materials described above (§ 3205(a)(2)(iii), cross-referring to § 3208).

The court of appeals held this statute unconstitutional, citing *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). The court of appeals inferred that " 'much of the information required * * * is designed not to inform the woman's consent but rather to persuade her to withhold it altogether' " (84-495 J.S. App. 48a (quoting 462 U.S. at 444)). And the court viewed the statute as mandating "a litany of information" that in-

trudes upon the attending physician's discretion (84-495 J.S. App. 48a-49a (quoting 462 U.S. at 444-445)).

The court of appeals plainly erred. Most of the information Pennsylvania requires is identical to that which the Court in *Akron* deemed "certainly * * * not objectionable," "probably * * * routinely made available to the patient," and "clearly * * * related to maternal health and to the State's legitimate purpose in requiring informed consent" (462 U.S. at 445-446 & n.37). It is true that Pennsylvania requires the doctor himself to provide the relevant medical information, permitting him to delegate to an assistant the provision of information about social services, financial assistance, and the like. Cf. *Akron*, 462 U.S. at 448-449 (holding that the physician generally must be allowed to "delegate[] the counselling task to another qualified individual"). But the division of labor Pennsylvania has adopted is surely a rational one, particularly in light of this Court's repeated stress on "the central role of the physician * * * in consulting with the woman about whether or not to have an abortion" (*Colautti*, 439 U.S. at 387).

The court of appeals likewise erred in holding that Pennsylvania cannot require that a woman be informed "[t]hat she has the right to review" certain printed materials (discussed above) published by the state health department. This information, unlike that deemed a "parade of horribles" in *Akron* (462 U.S. at 445), is required to be "objective, nonjudgmental and * * * accurate scientific information" (§ 3208(a)(2)). Moreover, the woman is free to decide for herself whether or not she wants to read these pamphlets, and "nothing in the statute prevents the physician from advising that [she] not view [them] or disputing or supplementing them with his own information" (84-495 J.S. App. 140a (Seitz, C.J., dissenting)). This Court has repeatedly held that the state may promote maternal health by ensuring that a woman's abortion decision is truly knowing, voluntary, and informed. It cannot seriously be contended that a state, by offering a person the right to read objective,

nonjudgmental materials before making a decision, would be held unconstitutionally to compel or coerce that person's decision in any other legal context.

f. Section 3214(a) requires that "[a] report of each abortion performed * * * be made to the department on forms prescribed by it." The physician must report routine statistical information about each abortion, such as the patient's age and marital status (but not her identity), the type of abortion procedure used, and any medical complications resulting therefrom. He must also report the basis for his determination "that a child is not viable," and, if he determines that the fetus is viable, to report "the basis for his determination that the abortion is necessary to preserve maternal life or health" (§ 3214 (a)(8), cross-referring to § 3211).

The court of appeals held this statute unconstitutional. While acknowledging that this Court has approved recordkeeping and reporting requirements for abortions, it asserted that "[t]he nature and complexity of [Pennsylvania's] requirements * * * have crossed the permissible threshold" (84-495 J.S. App. 80a). It reasoned that Pennsylvania's law would "have a significant impact on the woman's abortion decision" by "increas[ing] the costs of * * * abortions" by an unspecified amount (*id.* at 80a-81a).

The court of appeals' reasoning is seriously flawed. The statistical information Pennsylvania requires to be reported is information that "most physicians would obtain as a matter of course, or which is easily obtained through simpl[e] questions or observation" (84-495 J.S. App. 148a (Seitz, C.J., dissenting)). The court of appeals had no basis for distinguishing Pennsylvania's recordkeeping requirements from those approved in *Danforth*. Compare 428 U.S. at 79-81. The parties' stipulation that Pennsylvania's requirements would increase abortion costs by an unspecified amount—recordkeeping requirements always increase costs, a fact that obviously was equally true in *Danforth*—is irrelevant absent evidence about the magnitude of those expenses. Indeed, a host of state laws (be they tax laws or regulatory re-

quirements) impose increased costs on providers of medical services, and it could scarcely be contended that such laws are therefore unconstitutional. In any event, the record in this case contains no evidence about the actual costs imposed by Pennsylvania's reporting requirements, and the court of appeals thus had "no way of knowing what cost increase is attributable to [them]" (84-495 J.S. App. 149a (Seitz, C.J., dissenting)). Cf. *Ashcroft*, 462 U.S. at 489-490 (noting district court's findings as to cost of pathology reports and holding that those costs imposed "a relatively insignificant burden").

The court of appeals likewise erred in holding that Pennsylvania cannot require doctors to report the basis for their determinations about fetal viability and danger to maternal health. It is far-fetched to suggest, as did the court of appeals (84-495 J.S. App. 81a), that such reporting violates this Court's "directive that a physician be accorded broad discretion" in making these determinations. Obviously, a doctor does not have "discretion" to make unjustifiable and unsupportable judgments about life and death, and it is neither an affront nor an unreasonable burden to require that he rationally explain the basis for such decisions. Nor can it seriously be contended that the need to furnish such explanations unconstitutionally "chills" physicians' willingness to perform abortions. It is hard to see how Pennsylvania can enforce its legitimate interest in protecting fetal life if it is foreclosed from seeking such information.

2. *No. 84-1379.* The Seventh Circuit, ruling unanimously, struck down four sections of the Illinois Abortion Law. The court's decision ignores elementary principles of jurisdiction, comity and federalism in its relentless determination to invalidate the challenged provisions at all costs.

a. Section 6(4) of the Illinois Abortion Law, as enacted in 1979, prescribed a standard of care for a doctor performing an abortion when there existed "a possibility known to him" of fetal viability (84-1379 J.S. App. 8). On November 16, 1979, four days before Section 6(4)'s effective date, the district court issued a preliminary in-

junction against its enforcement, finding that it incorporated an unconstitutional definition of "viability" (*id.* at 3). In October 1983, the district court converted the preliminary injunction into a permanent injunction (579 F. Supp. 464, 470-471 (N.D. Ill. 1983)). On June 30, 1984, while the instant appeal was pending in the Seventh Circuit, the Illinois legislature amended Section 6(4) (see 84-1379 J.S. App. 9, 58-59). The court of appeals recognized that this amendment "substantially altered" Section 6(4) and the court specifically "decline[d] to evaluate [the] constitutionality" of the current version of the statute (84-1379 J.S. App. 9).

The court of appeals, however, proceeded to declare the repealed version of Section 6(4) unconstitutional. Rejecting the State's suggestion of mootness, the court likened the legislature's 1984 revision of the statute to "a defendant's voluntary abandonment" of prior unconstitutional conduct (84-1379 J.S. App. 18). The court theorized that the Illinois legislature "could reenact" the repealed version of Section 6(4), and was persuaded that "such a result would not be unlikely" inasmuch as the legislature had amended Section 6(4) twice during the previous five years (84-1379 J.S. App. 19-20). The court concluded that the State had failed to prove that it would not "return to its old ways" if plaintiffs' challenge were dismissed (*id.* at 20). The court also suggested that the 1983 version of the statute might have residual "chilling effects" despite its repeal (*ibid.*).

The court's reasoning is remarkable. The old version of Section 6(4) had been under continuous injunction from the day it was enacted until the day it was repealed. The statute thus could never have been applied to anyone, and the controversy concerning its validity was accordingly moot. Although this Court has recognized a narrow exception to the mootness doctrine where defendants "voluntarily abandon" challenged conduct for the purpose of evading judicial review (*City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)), we know of no instance, and the court of appeals cited none, where this exception has been held to cover a statutory amend-

ment by a state legislature, which, of course, is not even a "defendant" here.

The court of appeals, moreover, had absolutely no basis for concluding that reenactment of the defunct, allegedly unconstitutional statute was likely. The legislature's previous amendments to the law surely provided no basis for that conclusion, since those amendments, as the court itself recognized, represented faithful and repeated attempts "to alter the contours of [the] statute to reflect the latest judicial pronouncements in the area of abortion and privacy" (84-1379 J.S. App. 20). More generally, principles of federalism and comity make it wholly inappropriate for a federal court to presume that a state legislature and governor will act in bad faith by repealing and then reenacting a statute for the purpose of evading judicial review.[2]

b. Section 6(1) of the Illinois Abortion Law, as amended in 1979, prescribed a standard of care for a doctor performing an abortion "after the fetus is known to be viable" (84-1379 J.S. App. 6). On November 16, 1979, four days before the statute became effective, the district court preliminarily enjoined its enforcement, finding that it incorporated an unconstitutional definition of viability (*id.* at 3). In September 1983, the Illinois legislature amended the definition of viability, providing that a fetus is viable "when, in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support" (*id.* at 7, 58). On October 14, 1983, the district court sustained the amended definition

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[2] Appellants suggest (84-1379 J.S. 43) that, while the controversy as to the old version of Section 6(4) is moot, the controversy as to its current version remains alive, since the court of appeals' rationale for invalidating the former would also apply to the latter. Although we sympathize with appellants' desire to obtain guidance from this Court, we cannot agree with this submission. The court of appeals expressly "decline[d] to evaluate [the] constitutionality" of the current provision (84-1379 J.S. App. 9), and this Court "reviews judgments, not statements in opinions" (*Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

of viability, held that Section 6(1) was thus constitutional, and lifted the preliminary injunction (579 F. Supp. at 466, 469). On June 30, 1984, while the instant appeal was pending in the Seventh Circuit, the Illinois legislature amended Section 6(1) (see 84-1379 J.S. App. 7, 57-58). The court of appeals recognized that this amendment "substantially transformed section 6(1)" and the court "accordingly decline[d] to discuss the constitutionality" of the current version (*id.* at 7).

Once again, however, the court of appeals proceeded to declare the repealed version of the statute unconstitutional. Rejecting the State's suggestion of mootness, the court noted that old Section 6(1) had operative effect for the eight-month period between October 14, 1983, and June 30, 1984. The court observed that the statute of limitations had not expired with respect to events occurring during that period, and hence suggested that the State "could prosecute plaintiffs * * * if [they] violated [the repealed] section while it remained in effect" (84-1379 J.S. App. 15). The court found "this possibility insufficiently speculative to render [their] challenge * * * moot" (*id.* at 16).

The court's reasoning is flawed. The State explicitly advised the court of appeals that it would not initiate prosecutions of the type appellees assertedly feared (see 84-1379 J.S. 42, 48). Moreover, appellees brought a facial challenge to Section 6(1) and did not allege that they performed any late-term abortions during the eight-month period in question (see *id.* at 43). The possibility that appellees might be prosecuted under the old statute is thus too conjectural to satisfy Article III requirements. See, *e.g.*, *Los Angeles* v. *Lyons*, 461 U.S. 95, 101-110 (1983); *Poe* v. *Ullman*, 367 U.S. 497, 507 (1961).

On the merits, the court of appeals held the old version of Section 6(1) unconstitutionally vague. That statute made it illegal, in the case of a pregnancy termination "after the fetus is known to be viable," for "[a]ny physician or person assisting in such a pregnancy termination" intentionally to fail to manifest a specified standard of care. The court found the statute vague because

it "does not specify * * * which party, physician or assistant, must make this viability determination" (84-1379 J.S. App. 26).

As noted above, the Illinois legislature in September 1983 had amended the statute's definition of "viability" so as to make the determination of viability depend on "the medical judgment *of the attending physician.*" It would have required no great leap of logic for the court of appeals thence to infer that the legislature meant the determination of the attending physician, not of his assistant, to govern under old Section 6(1). Indeed, the 1984 amendment to Section 6(1) makes this explicit. See 84-1379 J.S. App. 57-58. We think that a fair reading of the statute compelled this construction of the 1983 version. In any event, this construction was plainly permitted, and the court of appeals was obliged to adopt that permissible construction under the well-settled principle that federal courts should construe state statutes in a manner favoring their constitutionality.

c. Section 2(10) of the Illinois Abortion Law defines an "abortifacient" as any substance or device "known to cause fetal death." Section 11(d) requires any person who prescribes or administers a substance or device "which he knows to be an abortifacient" to tell the recipient "that it is an abortifacient." Intentional or reckless failure to provide this information is a misdemeanor.

The court of appeals held these two provisions unconstitutional (84-1379 J.S. App. 43). The court did not suggest that Section 2(10)'s definition of "abortifacient" is inaccurate. Nor did it suggest that it is unconstitutional for a state to require a doctor who performs an abortion, or who prescribes an abortifacient, to tell his patient what he is doing. Indeed, a state in regulating abortions indisputably may require "the giving of information to the patient as to just what [will] be done and as to its consequences" (*Danforth*, 428 U.S. at 67 n.8). Rather, the court invalidated these two provisions because Section 2(10), in defining "abortifacient," refers to "fetal death," and because *another* section of the statute—Section 2(9), which was repealed in September

1983—formerly defined "fetus" as "a human being from fertilization until birth" (see 84-1379 J.S. App. 39-40, 60). Reading these three sections together, the court concluded that Section 11(d) unconstitutionally "foist[s] upon the pregnant woman [the State's] view that life begins at conception" (84-1379 J.S. App. 39 (citing *Akron*, 462 U.S. at 444)).

This line of reasoning is strained indeed. Section 11(d) simply requires that a doctor, when administering something that is likely to destroy the fetus, tell his patient that he is administering something that is likely to destroy the fetus. Destruction of the fetus in such circumstances is obviously a "consequence" of which the pregnant woman may be informed (*Danforth*, 428 U.S. at 67 n. 8). Section 11(d) does not say that the doctor must use the words "abortifacient" or "fetal death"; he is free to get the message across in any way he chooses. Moreover, the doctor is not required to refer to, or to say anything about, the definition of "fetus" formerly contained in Section 2(9). The pregnant woman presumably knows what a "fetus" is; if not, the doctor is free to explain it in his own words. All Section 11(d) requires is that the doctor tell her that she is about to have an abortion if that is what she is about to have.[3]

Section 11(d) is an entirely reasonable provision designed to ensure that women seeking birth control assistance understand the difference between "abortifacients" and "contraceptives." The difference is significant for many women, whether for physical, moral, or religious reasons, and the state plainly has a legitimate interest in ensuring that this difference is explained to them so that they may make an informed choice. In adopting a strained and illogical construction of Section

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[3] In any event, the court of appeals wholly ignored the fact that the statute's allegedly improper definition of "fetus" was repealed in September 1983. Since then, the statute has defined "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth" (84-1379 J.S. App. 60). It cannot seriously be contended that this definition impermissibly adopts any particular "theory of life" (*Roe* v. *Wade*, 410 U.S. at 162).

11(d), the court of appeals ignored both the State's legitimate interests and proper principles of judicial review.

B. The approach of the courts below betrays in our view an extreme and unseemly hostility to legitimate state regulation of abortion. By subjecting innocuous, even repealed, statutes to strained interpretations, apparently for no other reason than to invalidate them, the courts seemed determined to make regulations so difficult to sustain that abortions before the third trimester will become available virtually "on demand" (*Roe* v. *Wade*, 410 U.S. at 208 (Burger, C.J., concurring)). In so doing, the courts relied heavily on this Court's decision in *Akron*. See, *e.g.*, 84-495 J.S. App. 20a-21a, 24a-25a, 46a-47a, 48a-49a, 79a; 84-1379 J.S. App. 30, 35-36, 38-39. It is perhaps not fanciful to suggest that the courts below may have thought they detected in *Akron* an undercurrent of impatience with state efforts to regulate abortion, and to have taken their cue from that insight.

We believe that *Akron* does represent something of a departure from the Court's previous abortion decisions, both in the standard of review it applies and in the diminished weight it seems to attach to a state's legitimate interests in this area. In reviewing the instant cases, therefore, the Court may find it appropriate to consider whether *Akron* sent an erroneous message to the lower federal courts. There are several respects in which we think that might have happened.

1. This Court in *Roe* v. *Wade* held that the states have legitimate interests in protecting fetal life and preserving maternal health, and that these interests become sufficiently "compelling" at some point during pregnancy to justify restrictions on, or outright proscription of, abortion. Until *Akron*, however, the Court had not suggested that a state's choice among various alternative means of achieving a given "compelling" objective had *itself* to be supported by a compelling state interest. Rather, provided that the state was pursuing a "compelling" objective (*e.g.*, health), a particular regulation was deemed valid if it was "reasonably related" to that objective (*e.g.*, was a rational health regulation) and did

not "unduly burden" the woman's freedom of choice respecting abortion. See, *e.g.*, *Danforth*, 428 U.S. at 80; *Beal* v. *Doe*, 432 U.S. at 445; *Maher* v. *Roe*, 432 U.S. at 473.

The *Akron* decision seems to signal a departure from this analytical framework. Certain passages in that opinion suggest, for example, that a state, in crafting a regulation designed to protect maternal health, must demonstrate a "compelling interest" in selecting one of several options, each of which represents a rational means of achieving the state's goal. This is most evident in the Court's treatment of Akron's "informed consent" provisions. The ordinance required "the attending physician" to inform his patient of the relative risks and consequences of pregnancy and abortion (462 U.S. at 446). The Court acknowledged that this information was "clearly related to maternal health and to the State's legitimate purpose in requiring informed consent" (*ibid.*). The Court acknowledged the importance of having this information conveyed by a "well-trained and competent counselor[]" (*id.* at 449 n. 41). The Court acknowledged that its earlier decisions had "stressed repeatedly the central role of the physician * * * in consulting with the woman about whether or not to have an abortion" (*id.* at 447 (original quotation marks omitted)). And the Court found nothing in the record to "suggest that ethical physicians will charge more for adhering to this typical element of the physician-patient relationship" (*ibid.*). Yet the Court nevertheless held the ordinance unconstitutional because it required the attending physician to make the communication, rather than permitting his assistant to do so. The Court was "not convinced * * * that there is as vital a state need for insisting" that the information be conveyed by the one rather than by the other (462 U.S. at 448).

This holding, in our view, cannot be squared with the Court's previous opinions. A requirement that *the physician* convey the medical information was surely "reasonably related" to Akron's compelling health objective, and that requirement was not shown to have in-

creased the cost of abortions by a magnitude sufficient to impose an "undue burden" on pregnant women's freedom of choice. The regulation should accordingly have been sustained.

2. Prior to *Akron*, this Court had consistently recognized that a State may legitimately "make a value judgment favoring childbirth over abortion" (*Maher* v. *Roe*, 432 U.S. at 474). "The Constitution," the Court had said, "does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions," and hence the fact that a regulation "may inhibit some [women] from seeking abortions is not a valid basis to void the statute" (*H.L.* v. *Matheson*, 450 U.S. 398, 413 (1981)). To the contrary, the Court had held that "state action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life'" (*ibid.*, quoting *Harris* v. *McRae*, 448 U.S. 297, 325 (1980)).

Certain passages in *Akron* again seem to signal a departure from these principles. The Court in *Akron* suggested, for example, that a state regulation is invalid if it is "designed to influence the woman's informed choice between abortion or childbirth" (462 U.S. at 444 (footnote omitted)). On that premise, the Court struck down provisions requiring that certain information be furnished to a woman contemplating an abortion, reasoning that the information was "designed * * * to persuade her to withhold" her consent to that procedure (*ibid.*).

Once a woman steps into an abortion clinic, however, there is no way a state can promote its legitimate policy of "encouraging childbirth" without at the same time "discouraging abortion". A woman who enters "an abortion clinic, where abortions for pregnant minors frequently take place," is presumably inclined to terminate her pregnancy, and it is "unlikely that she will obtain adequate counsel from the attending physician at an abortion clinic," much less be dissuaded from her proposed course. *Bellotti II*, 443 U.S. at 641 (original quotation marks omitted). Indeed, as a doctor at one of the clinics involved in *Akron* testified, when a teenager

showed up at the clinic he assumed the decision was made: "When you go to a bar, you go there to drink" (81-746 Resp. Br. 20). Obviously, no state can promote a policy of "encouraging normal childbirth" in such circumstances unless it is allowed to place a counterweight in the other side of the scales.

The *Akron* majority thus had little basis in precedent for suggesting that state action is unconstitutional per se if it is "designed to influence the woman's informed choice between abortion or childbirth." If the state's interest in encouraging childbirth is to mean anything, and if the woman's consent to abortion is to be truly informed, the state must be allowed, in a reasoned and objective way, to tell its side of the story, and a story favoring childbirth is a permissible story for it to tell. Of course, should the state convey that message in an inaccurate or overbearing fashion, or otherwise attempt to compel or coerce the woman's decision, her decision would not be "knowing, intelligent, and voluntary" (*Danforth*, 428 U.S. at 90 (Stewart, J., concurring)), and the state's action would constitute "an unduly burdensome interference with her freedom to decide whether to terminate her pregnancy" (*Maher* v. *Roe*, 432 U.S. at 474). But an effort by the state to influence a pregnant woman to choose childbirth instead of abortion, in a manner that does not impair her freedom of choice, can hardly be thought to erect an unconstitutional obstacle.

3. Prior to *Akron*, this Court's abortion opinions generally reflected the well-settled rule that federal courts should accord state statutes a sympathetic construction that favors their constitutionality. See, *e.g.*, *Danforth*, 428 U.S. at 64; *Bellotti II*, 443 U.S. at 645 & n.25; *H.L.* v. *Matheson*, 450 U.S. at 406, 407 & n.14, 412. Once again, however, the *Akron* opinion seems to suggest a more hostile approach. This is perhaps most evident in the majority's treatment of Akron's regulation requiring that physicians performing abortions "insure that the remains of the unborn child are disposed of in a humane and sanitary manner" (462 U.S. at 451). The city averred that this regulation was designed simply "to

preclude the mindless dumping of aborted fetuses onto garbage piles" (*ibid.* (original quotation marks omitted)). The Court nevertheless held the regulation unconstitutionally vague, speculating that "[t]he phrase 'humane and sanitary' does, as the Court of Appeals noted, suggest a possible intent to mandate some sort of decent burial of [the] embryo" (*ibid.* (original quotation marks omitted)).

This approach is difficult to reconcile with the Court's previous opinions. Akron's ordinance was surely susceptible of a constitutional construction. The phrase "humane and sanitary" appears in countless laws regulating health and safety. Congress has even mandated the "humane * * * disposal of excess wild free-roaming horses and burros" (43 U.S.C. 1901(a)(6)). As a familiar regulatory formula, the phrase "humane and sanitary" resembles the phrase "informed consent," which the Court in *Danforth* held not to be vague (see 428 U.S. at 67 n.8). In striking down the Akron formula based on speculation that the draftsmen of the ordinance might have intended to mandate "some sort of decent burial" (462 U.S. at 451), the Court in *Akron* may have invited the kind of unsympathetic statutory construction, the temptation to impugn legislative motives, that the courts of appeals engaged in here.

C. Having said this, candor compels us to state our conviction that *Akron* is a symptom, not the source, of the problem. As the decisions below demonstrate, the constitutional inquiry mandated by *Roe* v. *Wade* is not easy for courts to conduct in a principled fashion. The key factors in the equation—viability, trimesters, the right to terminate one's pregnancy—have no moorings in the text of our Constitution or in familiar constitutional doctrine. Because the parameters of the inquiry are indeterminate, courts are disposed to indulge in a free-ranging, essentially legislative, process of devising regulatory schemes that reflect their notions of morality and social justice. The result has been a set of judicially-crafted rules that has become increasingly more intricate

and complex, taking courts further away from what they do best and into the realm of what legislatures do best.

We recognize that the principle of *stare decisis*, furthering as it does the policies of continuity and consistency of adjudication, weighs against reconsidering recent precedents. See *Atascadero State Hospital* v. *Scanlon*, No. 84-351 (June 28, 1985), slip op. 9-10 n.3; *Akron*, 462 U.S. at 420 & n.1. This principle, however, does not count so strongly in constitutional litigation, where, short of a constitutional amendment, this Court is the only body capable of effecting a needed change. See *Akron*, 462 U.S. at 420; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962). Moreover, this Court must respond to obligations that transcend the institutional concerns underlying the doctrine of *stare decisis*. *See Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 77-78 (1938) ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.") (Brandeis, J.)). Where a judicial formulation affecting the allocation of constitutional powers has proven "unsound in principle and unworkable in practice," where it "leads to inconsistent results at the same time that it disserves principles of democratic self-governance," this Court has not hesitated to reconsider a prior decision. *Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985), slip op. 18.

1. To provide a regime for delimiting the permissible scope of abortion regulation, *Roe* v. *Wade* divided pregnancy into three trimesters, with radically different consequences for state regulatory power in each. This analytical framework has proved inherently unworkable. Subsequent developments, both technological and medical, have demonstrated the arbitrariness of these lines: the Court "simply concluded that a line must be drawn, * * * and proceeded to draw that line" (*Garcia*, slip op. 14 (original quotation marks omitted)). Arbitrary line-

drawing may occasionally be necessary to make explicit constitutional rights efficacious, but such arbitrariness gains the appearance of legislation pure and simple where the subject is one upon which the Constitution is silent.

The Court in *Roe* v. *Wade* properly recognized that the states have a strong interest in safeguarding maternal health, but it is difficult to grasp why the compelling quality of this interest should undergo a radical change at the end of the first trimester. The Court made a determination—basically one of legislative fact—that "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth" (410 U.S. at 149, 163). The legislative nature of this finding is shown by "evidence that developments in the past decade, particularly the development of a much safer method for performing second-trimester abortions, * * * have extended the period in which abortions are safer than childbirth" (*Akron*, 462 U.S. at 429 n.11). The fact that *Akron*, despite this evidence, retained the end of the first trimester as the sharply determinative point demonstrates that point's essential arbitrariness. As Justice O'Connor wrote in dissent, "The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has *no* interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible" (*id.* at 460 (emphasis in original)).

It was similarly arbitrary for the Court in *Roe* v. *Wade* to determine that the state's legitimate interest "in protecting prenatal life" (410 U.S. at 150, 153-154) undergoes a constitutionally significant change at the point of fetal viability. There is no obvious constitutional connection between the ability of a fetus to survive outside the womb, and the magnitude of a state's lawful concern to protect future life. As Justice O'Connor said in her *Akron* dissent, "[*P*]*otential* life is no less poten-

tial in the first weeks of pregnancy than it is at viability or afterward. * * * The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward" (462 U.S. at 461 (emphasis in original)).

The "viability" standard is particularly unworkable as a constitutional reference point because it changes with advances in technology. The "increasingly earlier fetal viability" demonstrated in recent scientific studies (462 U.S. at 457 (O'Connor, J., dissenting)) obviously owes to improvements in medical techniques, and not to any change in our perceptions about how fully developed or worthy of life a fetus is at any point in time. It is disturbing to attribute constitutional significance to a point which, besides being in motion rather than being fixed, has its movements dictated by advances in engineering rather than by forces more familiar to traditional judicial analysis.

The arbitrary nature of *Roe* v. *Wade*'s analytical framework is reflected in the increasingly complex line-drawing of its progeny. A state may require that certain information be furnished to a woman by a doctor or his assistant (*Akron*, 462 U.S. at 448), but may not require that such information be furnished to her by the doctor himself (*id.* at 449). A state may require that second-trimester abortions be performed in clinics (*Simopoulos* v. *Virginia*, 462 U.S. 506 (1983)), but may not require that they be performed in hospitals (*Akron*, 462 U.S. at 437-439). As each set of these subtle distinctions was crafted, still more unanswered questions were posed. During the decade since *Roe* v. *Wade* the adversaries in the abortion debate have come back again and again, asking this Court to spin an ever-finer web of regulations. The adversaries are back again today. They are sure to return. Each time, the set of rules will get longer and more intricate. This is an inappropriate burden to impose on any court, or on any Constitution.

2. The second, compelling ground for our urging reconsideration of *Roe* v. *Wade* is our belief that the tex-

tual, historical and doctrinal basis of that decision is so far flawed [4] that this Court should overrule it and return the law to the condition in which it was before that case was decided.

There is no explicit textual warrant in the Constitution for a right to an abortion. It is true, of course, that words, and certainly the words of general constitutional provisions, do not interpret themselves. That being said, the further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges the meaning. Constitutional interpretation retains the fullest measure of legitimacy when it is disciplined by fidelity to the framers' intention as revealed by history, or, failing sufficient help from history, by the interpretive tradition of the legal community. That tradition is illuminated not only by court decisions, but by the practice of lawyers and legislatures "in the compelling traditions of the legal profession." *Rochin* v. *California*, 342 U.S. 165, 171 (1952) (Frankfurter, J.).

We respectfully submit that by these criteria *Roe* v. *Wade* is extraordinarily vulnerable. It stands as a source of trouble in the law not only on its own terms, but also because it invites confusion about the sources of judicial authority and the direction of this Court's own future course. *Stare decisis* is a principle of stability. A decision as flawed as we believe *Roe* v. *Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment.

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[4] This judgment is shared by a broad spectrum of constitutional scholars. See, *e.g.*, J. H. Ely, *Democracy and Distrust* 2-3, 248 n.52 (1980); Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817, 819; Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 371-373; A. Bickel, *The Morality of Consent* 27-29 (1975); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 297-311 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 Yale L.J. 920 (1973).

a. The ultimate textual source for *Roe* v. *Wade* (410 U.S. at 129) is the Fourteenth Amendment's guarantee: "nor shall any State deprive any person of * * * liberty * * * without due process of law." It is late in the day to argue that this provision should be limited to its apparent textual meaning: government's actually taking hold of a person, as to confine him, without fair procedures. The expansive possibilities of "due process," however, early offered temptations which by all accounts led to one of the most troubled and demoralizing episodes in our constitutional history, during which the Court repeatedly frustrated the workings of the ordinary democratic process by imposing its own debatable and parochial view of appropriate social policy. *E.g.*, *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923); *Lochner* v. *New York*, 198 U.S. 45 (1905). The now prevailing doctrine that the Due Process Clause incorporates particular protections of the Bill of Rights, however controversial on historical grounds,[5] was plainly intended to have the function of reining in such judicial extravagance and reanchoring the interpretation of that Clause in the constitutional text—though somewhat downstream of its historical starting point. See *Adamson* v. *California*, 332 U.S. 46, 69-72 (1947) (Black, J., dissenting).

Viewed in this context, *Roe* v. *Wade* seems particularly ill-founded. Due process analysis, while it must recognize the need to go beyond scrutiny of the few relevant words of the Clause, must nevertheless seek a connection with the intentions of those who framed and ratified the constitutional text. As this Court acknowledged in *Roe* v. *Wade* (410 U.S. at 138-139), however, and as Justice Rehnquist emphasized in dissent (*id.* at 174-176 & n.1), state laws condemning or limiting abortion were very general at the time the Fourteenth Amendment was adopted. Indeed, the period between 1860 and 1880 witnessed "the most important burst of anti-abortion legislation in the nation's history" (J. Mohr, *Abortion in*

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[5] See, *e.g.*, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949).

America 200 (1978)). Nor does the tenor and contemporaneous understanding of those laws leave much doubt that they were directed, not only at protecting maternal health, but also at what was widely viewed as a moral evil comprehending the destruction of actual or potential human life (see Mohr at 35-36) and the undermining of family values in whose definition and reenforcement the state has always had a significant stake. It is fair to conclude that those who drafted and voted for the Fourteenth Amendment would have been surprised indeed to learn that they had put any part of such subjects beyond the pale of state legislative regulation.

Surely this historical context of the Due Process Clause is relevant to its interpretation. The most usual and straightforward use of history is to illuminate the intention of controversial constitutional texts. The debate about the practices contemporaneous with the adoption of the Establishment Clause was waged precisely because it has been thought to bear on that Clause's meaning: either to show acceptance of considerable state involvement in religion (see *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 4-8; *Marsh* v. *Chambers*, 463 U.S. 783, 787-791 (1983)), or to demonstrate that such involvement had fostered a controversy the Clause was meant to resolve. History similarly has been invoked as dispositive in regard to the acceptability of the death penalty under the Eighth Amendment: How could framers who before, during and after that Amendment's adoption regularly acquiesced in the application of capital punishment be taken to have condemned this practice as cruel and unusual? See *Gregg* v. *Georgia*, 428 U.S. 153, 176-177 (1976) (plurality opinion); *Furman* v. *Georgia*, 408 U.S. 238, 380 (1972) (Burger, C.J., dissenting); *id.* at 408 n.6 (Blackmun, J., dissenting). History has regularly been invoked to elucidate the meaning of the Fifth Amendment's guarantee against self-incrimination (see *Kastiger* v. *United States*, 406 U.S. 441, 443-447 (1972); *Miranda* v. *Arizona*, 384 U.S. 436, 458-460 (1966)), and the Sixth Amendment's guarantee of trial by jury. See *Williams* v. *Florida*, 399 U.S. 78, 86-103

(1970); *Duncan* v. *Louisiana*, 391 U.S. 145, 151-154 (1968). In all these instances the use of history was straightforward. The purpose for which history is invoked in *Roe* v. *Wade*, by contrast, is far from evident. The Court's opinion appears to acknowledge the relevance of history, yet it reaches a conclusion in direct variance with the historical facts recited.

b. History is invoked in another way to take account of developments in society and the law. Such an approach has seemed particularly plausible in determining the application of the Fourth Amendment's protections to such undreamt-of developments as wire-tapping, electronic surveillance, the searches of automobiles and airplanes. History in this sense appears as a vector, in which the original understanding is seen as the point of departure for developing values implied and inchoate at the point of origin. But whether the vector is held to lead to a right to attend criminal trials (*Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 557-580 (1980)) or a right to travel (*Shapiro* v. *Thompson*, 394 U.S. 618, 630 (1969)), the Court has always taken pains to trace its point of origin back to specific constitutional provisions by a route either inferential or historical.

In *Roe* v. *Wade*, by contrast, the connections by either route were wholly missing and the Court was forced to leap to its conclusion. Certainly the course of legal attitudes and practice, "the compelling traditions of the legal profession" (*Rochin* v. *California*, 342 U.S. at 171), permit no extrapolation from the past to the Court's conclusion in *Roe* v. *Wade*. The story traced by the Court does not show a steady and growing acceptance of a point of view until the practice in a few jurisdictions can be characterized as anomalous. At most, the historical account in *Roe* v. *Wade* shows an ebb and flow of condemnation and concern about the practice of abortion. More accurately, it would seem that the passage of the Fourteenth Amendment roughly coincided with the rise of particular *stringency* in abortion laws, and that, between 1868 and 1973, such stringent laws appeared as a

general feature of the legal landscape, representing by the Court's own count the policy "in a majority of the States." 410 U.S. at 118. This historical trajectory does not support the conclusion for which it was adduced.

c. There remains the inferential route, by which a specific constitutional text is seen to harbor the germ of a theory that establishes a general and fundamental right. The classic statement of this line of reasoning is found in Justice Harlan's dissent in *Poe* v. *Ulman*, 367 U.S. at 541-543. He wrote that "the liberty guaranteed by the Due Process Clause * * * is not a series of isolated points pricked out in terms of" the particular rights enumerated in the first eight Amendments. Rather, he said, liberty "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints" (*ibid.*).

As Justice Harlan was at pains to insist, however, even this process of inferential extrapolation is directly rooted in textually specified constitutional values. The same connection "to what went before" is insisted upon in *Griswold* v. *Connecticut*, 381 U.S. 479, 484-485 (1965). The invocation in *Roe* v. *Wade* of both the particular concept of privacy and of this general mode of constitutional analysis, far from being anchored in text, history, or precedent, is an abrupt departure from the Court's prior decisions.[6] Indeed, all of the "privacy" cases that the Court cited in *Roe* v. *Wade* were applications of accepted

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[6] As Dean Ely explained, this Court's invalidation in *Griswold* of a statute regulating the *use* of contraceptives, as opposed to their manufacture or sale, indicated an underlying concern that enforcement of the statute "*would have been virtually impossible* without the most outrageous sort of governmental prying into the privacy of the home." 82 Yale L.J. at 929-930 (emphasis in original). A statute limiting a medical procedure performed by a doctor in a clinic or hospital is simply not analogous; abortion statutes could obviously be enforced without the necessity of repulsive searches. Fourth Amendment policies accordingly provide no support for the holding in *Roe* v. *Wade*.

principles, whether of equal protection [7] or of freedom of expression at the core of the First Amendment.[8] Neither equal protection, nor intrusion upon the home, nor freedom to think or promulgate ideas is involved in laws regulating abortion.

d. There can be no doubt of the strength of the conviction held by some that free access to abortion is a fundamental expression of individual freedom, and that such freedom is the first principle of a just society. A conviction of self-evidence may well accompany a view so strongly held. Yet this conviction does not constitute constitutional argument. It is at best an intuition based in controversial moral and social theories of the good life and of an individual's situation in society, theories "which a large part of the country does not entertain." *Lochner* v. *New York*, 198 U.S. at 75 (Holmes, J., dissenting). And when controversial but seemingly self-evident convictions are translated directly into constitutional doctrine, we risk repeating the whole lamentable story surrounding *Lochner* for which Justice Holmes (*id.* at 76) composed the epitaph at its birth: "[The Constitution] is made for people of fundamentally differ-

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[7] *Skinner* v. *Oklahoma*, 316 U.S. 535, 538 (1942) (criminal sterilization act violated equal protection by distinguishing without an adequate basis between persons convicted of larceny and embezzlement); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (statute prohibiting interracial marriages involved "invidious racial discriminations"); *Eisenstadt* v. *Baird*, 405 U.S. 438, 446-455 (1972) (statute prohibiting distribution of contraceptives violated equal protection by treating married and unmarried women differently without a rational basis).

[8] *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923) (invalidating law prohibiting the teaching of foreign languages in private elementary schools because "[m]ere knowledge of the German language cannot reasonably be regarded as harmful"); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (invalidating statute requiring all children to attend public schools); *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944) (prosecution of Jehovah's Witness under statute prohibiting sale by minors of periodicals implicates but does not violate freedom of religion); *Stanley* v. *Georgia*, 394 U.S. 557 (1969) (reversing criminal conviction for mere possession of films in defendant's home).

ing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

As in logic contradictory premises can be used to prove anything, so in constitutional law principles that are ill-founded can be used to justify any conclusion, and thus rob the law of its intrinsically compelling force. And when constitutional law, which is above ordinary politics, seeks to settle disputes of value and vision which are the stuff of politics, both law and politics are more not less subject to the kind of intense pressures which have characterized the abortion debate since *Roe* v. *Wade*.

CONCLUSION

The portions of the court of appeals' judgments that invalidate appellants' abortion regulations should be reversed.

Respectfully submitted.

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JASPER F. WILLIAMS, M.D.,
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v.

ALLAN G. CHARLES, M.D., *et al.*,
Appellees.

EUGENE F. DIAMOND, M.D., and
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Appellants,

v.

THE HOPE CLINIC FOR WOMEN, LTD., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a non-profit voluntary association, national in membership, organized to promote good will and har-

monious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the right to life of all, born and pre-born. To fulfill these purposes the League frequently files amicus curiae briefs in cases, such as this one, involving matters relating to abortion. The League is especially concerned with this matter because it involves the rights of women to be informed that they face abortion decisions of which they might otherwise be unaware. Information concerning the existence of decisions about abortion will help women make decisions which most correctly reflect their true conscientious and religious beliefs.

The League has obtained written permission to file this brief from the counsels of record for the parties to this matter. These letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Sections 11(d) and 2(10) of the Illinois Abortion Law, which require disclosure of the abortifacient character of a drug or treatment, are constitutional exercises of Illinois' right to inform patients of the existence of a decision about abortion. Required disclosure of the existence of a decision about abortion cannot interfere with the right of a woman to make that decision. Indeed, disclosure facilitates intelligent decisionmaking by informing women of a decision about abortion of which they might not otherwise be aware. Thus, required disclosure of the existence of a decision about abortion, unlike some types of required disclosure concerning the "significance" of the decision, cannot violate the constitutional protection accorded abortion decisionmaking. The statutes involved in this case, properly construed, only require informing the woman of the existence of the abortion decision, and are unquestionably constitutionally valid exercises of state authority to ensure informed consent in decisions about abortion.

ARGUMENT

This brief addresses the constitutional validity of §§ 11(d) and 2(10) of the Illinois Abortion Act,[1] which require disclosure of the abortifacient character of any drug, medicine, or instrument prescribed or administered. The court of appeals took the strange position that these provisions, designed to disclose the mere existence of a decision about abortion, burdened that decision. *See Charles v. Daley,* 749 F.2d 452, 461-462 (7th Cir. 1984). This interpretation misconstrued both the meaning of the relevant statutes and the scope of a state's authority to require disclosure of the mere existence of a decision about abortion.

I.

THE RIGHT INVOLVED IN ABORTION CASES IS THE RIGHT TO MAKE A DECISION ABOUT ABORTION.

Roe v. Wade, 410 U.S. 113, 153 (1973), guarantees women a right to make a decision whether to have an abortion. Be-

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[1] Section 11(d) sets out the disclosure requirement in the following manner:

> Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for which it is prescribed, or upon whom it is administered, that it is an abortifacient commits a Class C misdemeanor.

Section 2(10), in turn, defines "abortifacient" in the following fashion:

> "Abortifacient" means any instrument, medicine, drug or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.

Ill. Rev. Stat. ch. 38, paras. 81-22, § 2(10) and 81-31, § 11(d) (1983).

cause *Roe* guarantees a right to make a decision about abortion, it protects the right to decide not to have an abortion as fully as the right to decide to have an abortion. *See Maher v. Roe,* 432 U.S. 464, 472 n.7 (1977). Accordingly, the proper constitutional test applicable to regulation of abortion at any phase in pregnancy is whether the regulation impinges on the woman's decision, in consultation with her physician, about whether or not to have an abortion. *See City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 427-431 (1983).

II.

A STATE MAY CONSTITUTIONALLY SAFEGUARD A WOMAN'S INFORMED CONSENT TO AN ABORTION BY ENSURING HER AWARENESS OF BOTH THE DECISION ABOUT ABORTION ITSELF AND THE SIGNIFICANCE OF THE DECISION.

In *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 65-67 (1976), this Court concluded that a state could constitutionally safeguard a woman's informed consent to abortion by requiring that women provide written consent prior to undergoing an abortion. This Court held:

> The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

Id. at 67.

Danforth, thus, clearly establishes that permissible informed consent regulation consists of ensuring awareness of both the abortion decision itself and the significance of that decision, *id.;* this awareness is ensured by giving "information to the patient as to just what would be done and as to its consequences," *id.* at 67 n.7. *Danforth's* reasoning was reaffirmed by this Court in *City of Akron v. Akron*

Reproductive Health Care Center, Inc., 462 U.S. 416 (1983), in which this Court noted that the *Danforth* requirements furthered important maternal health-related concerns, *id.* at 430.

III.

INFORMED CONSENT PROVISIONS, SUCH AS §§ 11(d) AND 2(10) OF THE ILLINOIS ABORTION ACT, DIRECTED ONLY TO ENSURING AWARENESS OF THE DECISION ABOUT ABORTION ITSELF, RATHER THAN AWARENESS OF THE SIGNIFICANCE OF THE DECISION, DO NOT IMPINGE UPON THE RIGHT TO MAKE A DECISION ABOUT ABORTION.

If an informed consent provision merely ensures awareness of a decision about abortion itself, without touching upon the "significance" of that decision, it cannot logically or legally be held to impinge upon a decision about abortion. Indeed, informing women that a decision is to be made will actually facilitate, if not enable, a decision about abortion.

A provision designed only to ensure awareness of a decision about abortion itself cannot interfere with a woman's choice between abortion and childbirth. Making a woman aware of a decision about abortion of which she was not previously aware does not in any way impinge upon that decision about abortion. In fact, decisionmaking is aided because the woman becomes aware, perhaps for the first time, of a constitutional decision she can make.[2] If a woman was previously aware of the existence of a decision about abortion, she can hardly complain that her decision is interfered with by the state's attempts to ensure that minimal awareness.

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[2] Such information is particularly important because of the religious and moral differences many women posit between abortion and contraception. *See* Jurisdictional Statement at App. 31-67 (Affidavits of Diana Shark, Mary Christine Gaspar, and Debra Elrod Evans). These women believe abortion is the taking of life and would not use an abortifacient, although they might use artificial birth control. While moral questions are also raised by the use of artificial birth control methods, they are unquestionably different from those associated with abortion.

Unlike §§ 11(d) and 2(10) of the Illinois Abortion Act, the provisions in *Akron* were unconstitutional because they were addressed to the "significance" of the decision about abortion rather than the simple fact of the existence of a decision about abortion. *See* 462 U.S. at 444-445. The *Akron* ordinance sought to influence the decision about abortion rather than simply notify the woman that a decision was to be made. In contrast, information directed only to the fact that a decision is to be made cannot logically or legally be held to influence the making of that same decision. Accordingly, §§ 11(d) and 2(10) cannot be invalidated as impinging upon the choice between abortion and childbirth.

Similarly, merely informing a patient of an abortion decision without addressing its "significance" does not interfere with any legitimate rights associated with the exercise of a physician's medical judgment in physician-patient consultation. In *Akron* this Court stated that:

> The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion.

462 U.S. at 427. Neither of these aspects of the physician's medical judgment arises in a situation in which the state requires only that the woman be informed of the existence of an abortion decision.[3] Unless the woman knows of the decision to be made there is no "decisionmaking process" or "decision" to be interfered with. If the woman knows of the decision before she is informed, the decisionmaking process is not interfered with by a simple statement that there exists a decision to be made.

This situation again contrasts with the ordinance overturned in *Akron*, which required the physician to make certain statements regarding the "significance" of the decision

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[3] The physician, of course, has no right to conceal the fact that the woman may be undergoing an abortion.

about abortion, rather than the mere presence of a decision, irrespective of the physician's medical judgment. 462 U.S. at 444-445. The instant statutes merely require conveyance of the single most basic fact necessary to informed decision-making: that a choice exists. Accordingly, there is no interference with the physician's role in the decision about abortion.[4]

In order to avoid upholding statutes informing women of the existence of an abortion decision, the lower court construed the statutes in an inappropriate fashion. Specifically, the court read the statutes to require physicians to state that an abortifacient kills a human being.[5] Such a statement would bear on the "significance" of the decision about abor-

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[4] The Seventh Circuit's alternative rationale—that the statutes impinge upon a supposed separate contraception right—may be quickly disposed of. *See* 749 F.2d at 462. There is only one right involved in this matter: the constitutional right to privacy. *See Akron*, 462 U.S. at 426-427 (collecting cases indicating that rights to abortion and contraception spring from identical constitutional source); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (right to privacy found in contraception cases encompasses decision about abortion). When a known abortifacient is involved, the constitutional right to privacy is to be measured by standards applicable to abortion rather than contraception.

[5] The court of appeals arrived at this conclusion by a Byzantine route. The court started with another statute (ch. 38, para. 81-22(9) (1983)) which described a fetus as a human being from conception until death. 749 F.2d at 462. (The court's description was incorrect on two counts. First, this statute had described a fetus as a human being from conception until birth, not death. Second, this statute had been amended prior to the court's decision to reflect a scientific, philosophically neutral description of the fetus as an organism of the species of homo sapiens from fertilization until birth. The court ignored this amendment, although it had been called to the court's attention. Jurisdictional Statement at 21 n.5.) The court further observed that § 2(10) defines abortifacient as a drug which kills a fetus. *Id.* The court then noted that § 11(d) required patients to be informed when prescribed drugs are abortifacients. *Id.* Putting all these statutes together, the court pronounced that §§ 11(d) and 2(10) necessarily required physicians to indicate to patients that they were killing human life. *See id.*

tion,[6] and might well be impermissible as an attempt to adopt a single theory of life in the regulation of abortion. *See Akron,* 462 U.S. at 444.

However, the statutes can more reasonably be read in a fashion contrary to the court of appeals' interpretation. This reading would require only a statement that a drug or treatment is an abortifacient, and would require no additional statements concerning the significance of this fact. Indeed, the text of § 11(d) requires only a simple statement that a drug or treatment is an abortifacient. The notion that a further statement is required concerning the "significance" of this abortifacient character is neither explicit in the statutes nor necessarily implied. The court of appeals, perversely, performed gymnastic feats of statutory construction in order to create constitutional difficulties in a statute susceptible to an obvious limiting construction.

In light of the reasonableness of an interpretation which would render the involved statutes constitutional, the lower court decision appears plainly erroneous.

First, the lower court's interpretation offended norms of statutory construction rooted in federalism. Federal courts lack jurisdiction to authoritatively construe state statutes. *See Gooding v. Wilson,* 405 U.S. 518, 520 (1972). This means that a federal court should not construe statutes in a manner which raises doubts about their constitutional validity prior to state court decisions applying the statutes in a constitutionally improper manner. *See Minnesota ex rel. Pearson v. Probate Court,* 309 U.S. 270, 274 (1940). Indeed, in previous

[6] Of course this fact alone does not invalidate the statutes. *See Akron,* 462 U.S. at 446-447 (stating that required statements of risks of particular pregnancy, description of abortion procedure to be employed, general description of steps necessary for recovery and such other information that the physician believes, in the exercise of his or her judgment, to be relevant to particular decision about abortion could be permitted); *Danforth,* 428 U.S. at 67 (allowing required statement about significance of decision and furnishing information as to just what would be done and its consequences).

abortion regulation cases this Court has required federal courts to abstain from passing on the constitutional merits of statutes prior to state court interpretation, when the statutes were "susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.' " *H. L. v. Matheson,* 450 U.S. 398, 407 (1981); *Bellotti v. Baird,* 428 U.S. 132, 147 (1976) (*Bellotti I*). Clearly, the lower court exceeded and abused any authority it has to construe state statutes when it interpreted statutes readily susceptible to a constitutional interpretation, in a manner rendering them unconstitutional, prior to any opportunity for state courts to provide an appropriate limiting construction.

The lower court's construction also was erroneous because it did not accurately reflect current Illinois law. The definitional provision the court found offensive was repealed prior to the court's decision, and this fact was brought to the court's attention. Jurisdictional Statement at 21 n.5. Inexplicably, the lower court ignored this amendment. The current definitional provision could not reasonably be held to "foist" any view of life on anyone, because, even if it were required to be utilized in a physician's statement (which it is not), it would simply describe the fetus in a scientifically and philosophically neutral manner: an individual organism of the species homo sapiens from fertilization until live birth. Such a view would be consistent with any theory of life.

The lower court's construction was also improper because it completely ignored the views of state officials charged with enforcement of these statutes. Both Attorney General Hartigan and State's Attorney Daley construed the involved statutes simply to require a statement that a drug is an abortifacient, and not to require any further statement concerning the significance of the drug's abortifacient character. *See* Jurisdictional Statement at 26 n.8. When state officials charged with enforcement construe statutes in a reasonable,

constitutionally valid manner, a federal court should not arbitrarily substitute an interpretation which renders the statutes unconstitutional. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (federal court should consider any limiting construction that a state enforcement agency has proffered in evaluating a facial challenge to a state law); *Broadrick v. Oklahoma*, 413 U.S. 601, 617-18 (1973) (court should not ignore authoritative pronouncements of state board and attorney general which would render statute constitutional in determining breadth of statutory definition of political activities); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 162-63 (1971) (court should give respectful consideration to state agency's construction of statute which would render statute constitutional). Because the enforcing state officials construed the involved statutes in a reasonable, constitutionally valid manner, the lower court should have at least taken their interpretation into account, instead of ignoring this construction and substituting its own interpretation to invalidate these state statutes.

CONCLUSION

Sections 11(d) and 2(10) of the Illinois Abortion Law, as properly construed, set forth constitutionally appropriate requirements providing for disclosure of information pertaining only to the existence of a decision about abortion. The lower court's miscontruction of the statutes inappropriately substituted an unconstitutional interpretation of state statutes for a reasonable, constitutional interpretation of the same statutes, without allowing for an authoritative construction of the statutes by a state court. The impropriety of the lower court's statutory construction is underscored by both its failure to reflect the current statutory language and its inconsistency with the interpretation of these statutes adopted by the state officials charged with their enforcement. Accordingly, §§ 11(d) and 2(10) should be up-

held, and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Nos. 84-495 and 84-1379

IN THE

Supreme Court of the United States

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Appellants

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INTEREST OF AMICI

This brief *amici curiae* is being submitted on behalf of the National Organization for Women (NOW), Human Rights for Women, Inc., Equal Rights Advocates, The

League of Women Voters for the United States, Northwest Women's Law Center, National Women's Law Center, NOW Legal Defense and Education Fund, and Women's Legal Defense Fund.[1] *Amici* are women's rights and civil rights organizations[2] whose constituencies and interests are seriously affected by the decisions in these cases. At issue is whether a woman's fundamental right to privacy in deciding whether or not to terminate a pregnancy will continue to be protected against undue state interference. *Amici* file this brief because of the extraordinary importance of this right to women, girls and their families.

INTRODUCTORY STATEMENT AND SUMMARY

As recently as 1983, in a series of cases involving state statutes and local ordinances restricting access to abortions, this Court reaffirmed that the fundamental constitutional right of privacy encompasses, and protects against undue governmental interference, a woman's right to make the highly personal choice whether or not to terminate her pregnancy. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 (1983). The instant cases again present for this Court's review state legislation that attempts to restrict the exercise by women of this constitutionally protected right.

In *Thornburgh v. American College of Obstetricians and Gynecologists*, No. 84-495, this Court is being asked to review the constitutionality of various sections of the Pennsylvania Abortion Control Act, 19 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983) ("Pennsylvania Act"),[3]

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[1] Counsel for all parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

[2] Statements describing each organization appear in the Appendix to this brief.

[3] The Pennsylvania Abortion Control Act, at issue in *Thornburgh*, No. 84-495, was signed into law on June 11, 1982, prior to this Court's ruling in *Akron*. *See* Jurisdictional Statement at 8a-14a, *Thornburgh*, No. 84-495.

which require, *inter alia*, that the method used in performing abortions involving a viable fetus, absent "significantly greater" risk to the mother, be that most likely to result in live birth Section 3210(b)).[4] The Third Circuit held these provisions unconstitutional. Jurisdictional Statement at 43a-50a, 68a-71a, *Thornburgh*, No. 84-495 [hereinafter cited as *Thornburgh*, J.S.].

The Illinois Abortion Law of 1975, as amended (the "Illinois law"), at issue in *Diamond v. Charles*, No. 84-1379, makes it a felony for a physician performing an abortion involving a fetus that the physician knows has "a possibility . . . of sustained survival" to fail to exercise a certain standard of care toward the fetus and requires that doctors who prescribe certain types of birth control substances or devices inform their patients that they are being given "abortifacients."[5] The Seventh Circuit held both of these provisions unconstitutional. Jurisdictional Statement, Appendix at 32-43, *Diamond*, No. 84-1379 [hereinafter cited as *Diamond*, J.S. App.].

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[4] Also presented for review are requirements that: two physicians be present at all abortions performed after viability; certain specified information be provided to all abortion patients; physicians and abortion providers submit reports on all abortions and facilities; minors seeking abortions obtain the consent of at least one parent or guardian; and, certain printed material discussing available social services and scientific information about the fetus be made available by the state. All of these provisions were struck down by the Third Circuit. Although *Amici* believe that all of these provisions are invalid and urge affirmance of the Third Circuit's decision, they will not address them further herein.

The Third Circuit also struck down the section of the statute requiring more expensive insurance premiums for health and disability policies that include abortion coverage. Appellants did not appeal this ruling.

[5] The statute also makes it a felony for a physician who performs an abortion involving a fetus "known to be viable" to fail to use the specified standard of care toward the fetus. The Seventh Circuit found this provision to be unconstitutionally vague. *Amici* urge affirmance of that finding, but will not address this provision further.

The right to privacy in the decision whether to terminate a pregnancy—the most profound and difficult of procreative and personal decisions—was first recognized in *Roe v. Wade*, 410 U.S. 113 (1973), and strongly reaffirmed two years ago in *Akron*. None of the parties to these appeals have taken issue with this Court's holdings in *Roe* and *Akron*. An *amicus* brief filed by the Acting Solicitor General, however, urges this Court to reconsider and reverse *Roe v. Wade*. Amici submit that this attack is constitutionally flawed and blatantly hostile to the health and lives of girls [6] and women. The first section of this brief examines the arguments made by the Solicitor General urging reversal of *Roe v. Wade* and sets forth why those arguments are insupportable. *Roe v. Wade* must again be affirmed unequivocably.

In the second part of the brief, *Amici* consider the three statutory provisions identified above: the method of abortion (Section 3210(b)) provision of the Pennsylvania Act; and the standard of care toward a potentially viable fetus (Section 6(4)) and "abortifacient" (Section 11(d)) provisions of the Illinois law. As was recognized by the respective Courts of Appeals in their rulings on these cases, these three provisions impermissibly restrict the fundamental right of a woman to choose to have an abortion. *Amici* will argue below that these rulings should be upheld. These three provisions, as meas-

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[6] Throughout this brief, any reference to women is intended to include girls as well, because the right to choose to have an abortion is of fundamental significance to any female of childbearing age. *See Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976). In 1981, 28% of all abortions—approximately 364,210—were performed on girls 19 years old or younger. Center for Disease Control, 33 *Morbidity & Mortality Weekly Report*, No. 26, p. 373 (July 6, 1984). In addition, in 1982, girls between the ages of 15 and 19 had 513,758 live births. National Center for Health Statistics, 33 *Advance Report of Final Natality Statistics*, No. 6, Supplement, p. 13, Table 2 (September 28, 1984).

ured according to strict judicial scrutiny,[7] are unconstitutional.[8]

ARGUMENT

I. A WOMAN'S FUNDAMENTAL RIGHT TO DECIDE WHETHER OR NOT TO TERMINATE HER PREGNANCY—A RIGHT ESSENTIAL TO HER ABILITY TO CONTROL HER OWN LIFE—MUST BE PROTECTED FROM IMPERMISSIBLE GOVERNMENTAL INTERFERENCE.

A. The Supreme Court's Decision In *Roe v. Wade* Correctly Followed Well-Established Precedent And Should Be Affirmed.

Based on a long and compelling line of constitutional authority through which the Court endeavored to give meaning and substance to the concept of personal liberty guaranteed by the Constitution, this Court concluded in 1973 that the right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. at 152-56. Although the Court rejected arguments that the woman's right to choose an abortion is absolute, it deemed the right fundamental. *Id.* at 155.

Roe v. Wade follows this Court's prior rulings about the right to privacy. The right to privacy in family, marital and reproductive decisions has been, for many

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[7] The strict scrutiny standard is called into play if two conditions exist. First, the obstacle to the exercise of the fundamental right must have been created by the government. *Maher v. Roe*, 432 U.S. 464 (1977). Second, the restriction must impinge upon the exercise of the fundamental right. *Danforth*, 428 U.S. 52 (1976). Since both conditions are present, the obstacles created by the Pennsylvania and Illinois statutes can stand only if justified by a compelling state interest narrowly drawn. *Roe v. Wade*, 410 U.S. 113 (1973).

[8] In both of these cases appellants raise jurisdictional issues, including whether or not the respective Courts of Appeals exceeded their proper scope of review. These issues, although important, are outside the specific interests of *Amici* and are not addressed herein.

decades, consistently protected by the Supreme Court. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The first of these privacy cases, *Meyer*, held that the 14th Amendment to the U.S. Constitution protects a zone of family and marital rights that are recognized as "essential to the orderly pursuit of happiness." The Court stated that

> [w]hile this Court has not attempted to define with exactness the liberty thus guaranteed, . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual . . . to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience . . . .

Id. at 399. Thus, fifty years before *Roe v. Wade*, this Court recognized that the Constitution protected the marital and family privacy of individuals from governmental intrusion.

The area of marital privacy was also protected by the Court in *Griswold*. In that case, the state of Connecticut made the use of contraceptives a criminal offense. The Court found that the statute was an unconstitutional invasion of privacy. Justice Douglas' majority opinion justified the constitutional right of privacy as a logical and necessary corollary of the specific guarantees of the Bill of Rights. "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. (Citation omitted.) Various guarantees created zones of privacy." 381 U.S. at 484. The prohibition against contraception affected "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485. Citing *Boyd v. U.S.*, 116 U.S. 616, 630 (1886) and *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), this Court found that the Fourth and Fifth Amendments "create a zone of privacy," a right to be left alone by government

in marital and family relationships. *Id.* at 484-5. Finally, in concluding his opinion, Justice Douglas described the marital right of privacy as one that predates the constitutional framework itself:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school systems. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

In *Eisenstadt v. Baird*, this Court clarified the holding in *Griswold* by concluding that the right to privacy in making reproductive choices applied to single persons as well as to married couples. The Court held that dissimilar treatment of married and unmarried persons in limiting access to contraceptives violated the equal protection clause of the 14th Amendment. The Court concluded that there was no rational explanation for the different treatment of married and unmarried persons. The Court stated that, whereas in *Griswold* the issue was marital privacy, such privacy rights belong not to the couple as an entity, but to each member of the couple:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. *If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.*

Eisenstadt, 405 U.S. at 453 (emphasis added). Thus, the Court established that the fundamental right to make

choices regarding one's reproductive life free of unwarranted governmental intrusion belonged to each *individual*.

The government claims that this Court's subsequent holding in *Roe v. Wade*, that the right to privacy encompasses a woman's right to decide whether to have an abortion, was a radical departure from historical constitutional precedent. This claim is patently false. While *Roe v. Wade* dealt with medical procedures that were unavailabe throughout much of the nation's history, and while the decision was this Court's first pronouncement on abortion, the decision nonetheless followed an established constitutional framework.[9] In asking for reversal of *Roe v. Wade*, while not questioning the right of privacy as a fundamental constitutional right, the government asks this Court for an illogical, nonsensical constitutional holding. As Justice Stewart noted in his concurring opinion in *Roe*,

> Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interest that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), or the right to teach a foreign language protected in *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Id. at 170 (quoting *Abele v. Markle*, 351 F. Supp. 224, 227 (D.Conn. 1972)). The government's argument, if successful, would lead to the absurd conclusion that whether or not a child is taught German or French is a more intimate and private matter than whether or not one has a child at all.

The government's attack on *Roe*, for the most part, ignores the analytic framework of the privacy doctrine set out in *Griswold*, *Eisenstadt* and *Roe*. It does not consider what the right of privacy means or how it has developed through this Court's pronouncements over the past sixty-odd years. Thus, the government urges this Court

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[9] *See* Heymann and Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. Rev. 765 (1973).

to abolish the privacy doctrine as it applies to abortions, but does *not* seek reversal of *Griswold* or *Eisenstadt*. Its brief in no way explains how the right to privacy can protect birth control usage and yet not apply to the right of women to determine whether or not they will carry a pregnancy to term. The Solicitor General claims, in a footnote, that the holding in *Griswold* was based on a concern that enforcing the statute would have required "governmental prying into the privacy of the home." Brief for the United States as Amicus Curiae at 28 n.6, *Thornburgh* and *Diamond* [hereinafter cited as S.G. Brief]. Outlawing abortion, the government claims, can be done without such "repulsive searches." *Id.* This statement betrays total contempt for the women who must make decisions about abortion. It totally disregards the gross invasion of privacy and repulsive seizure of the person implicated by governmental restrictions on abortion.[10]

The Solicitor General argues that the answer to whether *Roe* was correctly decided is to be found in the history of the due process clause of the 14th Amendment and the intentions of its framers. He relies on the premise that since the states were free to regulate, and prohibit, abortion in the 1860's, so should they be free to do so today. That premise totally disregards the differences between the legal and social status of women today, as compared to what it was in the middle of the Nineteenth Century.[11]

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[10] The administration's interpretation of *Griswold* is highly inaccurate. *Griswold* protects intangible rights: the right of privacy, the right of marital intimacy. *Griswold* is by no means limited by this Court to protecting real estate from search. *See* Tribe, *The Supreme Court, 1973 Term—Forward: Toward A Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 17 & n.83.

[11] In the 1860's, women had few, if any, legal rights. *See generally*, L. Kanowitz, *Women and the Law—The Unfinished Revolution* (1969); L. Kanowitz, *Sex Roles in Law and Society* (1973). Given this historical fact, it is difficult to see how the intentions or contemplations of the men who enacted the 14th Amendment could in any way be relevant to its application to the legal rights of women today.

Moreover, with respect to the personhood of a fertilized ovum, history consistently demonstrates that no such personhood ever

The attack against *Roe* challenges the wisdom and appropriateness of the Court's conclusion that a woman's right to determine whether or not to terminate a pregnancy is fundamental and encompassed within the right to privacy.[12] The Solicitor General refers to an "instability in the law" [13] he says was caused by *Roe*, but ignores

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existed or was intended. In spite of broad prohibitions against abortion, exceptions always existed under most state laws on the grounds of the pregnant woman's health, fetal abnormality, rape or incest, etc. *See* Luker, *Abortion & the Politics of Motherhood* 32-33, 80-81, n.18 (1984). If the fertilized ovum is held to be a person by this Court, any such exceptions for therapeutic abortions would violate the 14th Amendment. *Roe*, 410 U.S. at 157, n.54. The embryo would then have a right to life *superseding* the life of the pregnant woman. Indeed, abortion would not be permitted to save the life of the pregnant woman. Thus, this Court wisely rejected the theory of embryonic personhood because it was entirely inconsistent with virtually all American abortion legislation at the time the 14th Amendment was adopted, as well as during prior decades and thereafter. *See* Luker, *supra*, at 11-39.

[12] It is important to note that this Court held in *Roe* that the woman's right to privacy in considering abortion is not absolute. *Id.* at 154. It must be balanced against important competing state regulatory interests. *See also*, Justice Burger's concurring opinion: "Plainly, the court today rejects any claim that the Constitution requires abortion on demand." *Id.* at 208. Sen. Humphrey's alarmist conclusion that *Roe* results in "abortion-on-demand" and prevents state prohibition of abortion "at any time during pregnancy," thereby permitting abortion "right up to birth" (Brief Amicus Curiae of U.S. Sen. Gordon J. Humphrey, et al. at 5-7, *Thornburgh* and *Diamond*), is therefore entirely false. This Court carefully considered the important fundamental right to privacy in making reproductive choices, but it also weighed the competing interests served by state regulation of abortion.

[13] S.G. Brief at 2 and 24. The Solicitor General also complains that courts have had difficulty in applying *Roe v. Wade*. *Id.* at 20. The basis for this assertion, however, is left unstated. *Amici* suggest that the statement merely reflects the administration's disagreement with the particular application made in *Roe* of the familiar constitutional doctrine underlying the right to privacy. Thus, it counters what is called the "extreme and unseemly hostility" of the courts below toward abortion regulation (S.G. Brief at 16) with arguments that ignore the fact that those courts, and this

the tyranny that existed before *Roe* when women could be, and were, denied the most basic measure of personal, bodily integrity and self-determination. Summary reversal of *Roe* would lead to extreme uncertainty on the part of medical professionals as to the legality of many standard medical procedures. It would result in a legal and health care crisis of nationwide proportions and in the injury or death of thousands of women and teenage girls.

The government argues, in effect, that the right of the state recognized in the funding cases to make policy judgments favoring childbirth over abortion [14] gives the state the right to intrude between a woman and her physician in determinations regarding appropriate medical treatment. Reference to the funding cases alone, however, ignores the important distinction, emphasized by the Court in both the decisions referenced by the government, between direct state interference with a protectd activity—the right to decide whether to terminate a pregnancy—and state encouragement of an alternative activity. *Maher v. Roe*, 432 U.S. 464, 473-75 (1977). The cases at bar involve direct governmental interference with the constitutionally protected right to decide whether to terminate a pregnancy. Thus, were the government's position accepted, the right of the state to favor childbirth would become the bludgeon with which a woman's right to personal liberty is destroyed. As Justice Douglas noted in his concurring opinion in *Doe v. Bolton*:

> Where fundamental personal rights and liberties are involved the corrective legislation must be "narrowly drawn to prevent the supposed evil" (citations omitted) and not be dealt with in an "unlimited and indiscriminate" manner. (Citations omitted.) Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveler of constitutional rights and liberties.

410 U.S. 179, 216 (1973).

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one, are dealing with legislation that is designed to deprive women of the fundamental constitutional right to privacy.

[14] *See, e.g., Maher v. Roe*, 432 U.S. 464 (1977).

To abandon, as the government urges, the course taken in *Roe v. Wade* would render for women the constitutional guarantee of personal liberty an empty promise incapable of attainment. Speaking for the rights of women, those individuals who uniquely understand all of the interests at stake in the decision whether or not to terminate a pregnancy, *Amici* urge this Court to hold steadfast in its defense of the fundamental right recognized in *Roe* and affirmed in *Akron*.

B. The Right To Choose Abortion Is, In Essence, The Right To Control One's Life, Without Which Most Other Rights Become Meaningless.

If there is to be any re-examination of *Roe*, *Amici* urge that it be one which again acknowledges and affirms that the right of each individual woman to control her reproductive functions is nothing less than the right to control her own life. Indeed, "the right of a woman to determine her own reproductive life is a basic human right" [15] and it must be accorded constitutional protection commensurate therewith. If women do not have the right to terminate unwanted pregnancies, their rights to life, liberty, and the pursuit of happiness are virtually meaningless. They cannot participate as full and active members of society.

In *Roe*, Justice Blackmun touched upon the importance to women of the right to decide whether to terminate a pregnancy by referencing how pregnancy and maternity can affect a woman: higher mortality rates, physical and psychological harm, abandonment of educational plans, and loss of income and career opportunities.[16] *Roe*, 410 U.S. at 153. These factors, though they establish a compelling predicate for the right identified therein, present but a mere shadow of the fundamental personal and social interests at stake in the determination of who should have the right to control a woman's decisions re-

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[15] Presidential Task Force of the Citizens' Advisory Council on the Status of Women, *Task Force Report on Family Law and Policy* 31 (1968).

[16] *See also, Doe v. Bolton*, 410 U.S. 179, 214-15 (1973) (Douglas, J., concurring).

garding her reproductive functions. Stated most concisely, denied the right to choose whether and when to bear children women will forever be denied full membership and participation in our society.[17]

To begin to appreciate the extent to which women's role in society has been narrowly limited by their reproductive functions one need look no further than the numerous and oft-cited pronouncements of this Court regarding the role of women in society, among the most notorious of which is as follows:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. And as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
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> . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained,

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[17] *See* N. Erickson, *Women and the Supreme Court: Anatomy is Destiny*, 41 Brooklyn L. Rev. 209, 214 (1974) ("[s]tereotyped sex-role assumptions are based ultimately on the core concept that woman's role is narrowly limited by her reproductive function.") and C. Jones, *Abortion and the Consideration of Fundamental, Irreconcilable Interests*, 33 Syracuse L. Rev. 565, 570-71 (1982). *See also*, Tribe, *supra* note 10, at 40, where in discussing whether a woman's husband should have the right to decide whether she may have an abortion, Prof. Tribe notes:

> To give men the unreviewable power to sentence women to childbearing and childraising against their will is to delegate a sweeping and unaccountable authority over the lives of others. Any such allocation of roles would operate to the serious detriment of women as a class, given the multitude of ways in which unwanted pregnancy and unwanted children burden the participation of women as equals in society. Even a woman who is not pregnant would inevitably be affected by her knowledge of the power relations thereby created.

> even when like legislation is not necessary for men, and could not be sustained.

Muller v. Oregon, 208 U.S. 412, 421-23 (1908).[18] The resultant protections not only limited the hours women could work, but also the types of jobs they could obtain, the professions they could pursue and all nature of legal rights otherwise afforded men.[19] In this context, one can more clearly appreciate that the ability of women to control their own reproductive processes is of tremendous importance to the role women will play in society.

The immediate personal consequences of a return to the time when government was free to interfere with, and preclude, a woman's decision to terminate her pregnancy must also weigh heavily in the Court's consideration of this issue. Prior to *Roe* when abortion was illegal in most states unless necessary to save the life of the mother, it is estimated that between 200,000 and 1,200,000 illegal abortions were performed annually.[20] As one District Court

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[18] The statute before the Court in *Muller* limited the number of hours women could be employed for pay outside the home. Of course,

> [n]o law has ever attempted to prevent any woman, whether actually pregnant or one of the unmarried and sixty-year-old potential mothers of the race, from performing any amount of heavy work without pay. She may scrub floors . . . go into the field and replace a horse or hired man . . . with a full job of housework care for several young children all their waking hours . . . .

Note, *Constitutional Law—Regulation of Conditions of Employment of Women: A Critique of Miller v. Oregon*, 13 B.U.L. Rev. 276, 289 (1933).

[19] *See* generally, B. Babcock, A. Freedman, E.H. Norton and S. Ross, *Sex Discrimination and the Law, Causes and Remedies* (1975), pp. 4-53, 51-66; L. Kanowitz, *supra* note 11, at 31-38.

[20] W. Cates, *Legal Abortion: The Public Health Record*, 215 Science 1586 (March 26, 1982). By comparison, in 1969, there were only approximately 22,000 reported legal abortions in the United States. By 1972, the number of legal abortions had increased to almost 600,000, and yet "the Center for Disease Control estimates that 130,000 women were unable to obtain legal abortions and resorted to illegal or self-induced procedures during that year."

observed in 1972, it was "common knowledge that if women cannot obtain (lawful) abortions . . . many (will) subject themselves to the notorious 'back-street abortion' . . . fraught with the myriad possibilities of mutilization, infections, sterility and death." *YWCA v. Kugler*, 342 F. Supp. 1048, 1074 (D.N.J. 1972). Estimates of annual deaths caused by illegal abortions were difficult to obtain due to the clandestine nature of such abortions. However, such estimates were as high as 5,000 to 10,000 deaths per year.[21] Other adverse health consequences, such as severe infection,[22] permanent sterility,[23] or other serious complications were, of course, even more frequent than death.

The tragic consequences certain to follow from denial to women of the right to legal, safe abortions have most recently been illustrated by events following this Court's decisions denying poor women the right to Medicaid funding for abortions.[24] Studies document the intense determination women have exhibited to control their own reproductive destinies, and the hardship, distress and human

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Alan Guttmacher Institute, *Abortion in the U.S.: Two Centuries of Experience*, 2 Issues in Brief, No. 4 at 3 (1982). Since 89% of the legal abortions performed in 1972 were performed in 17 states that had repealed or reformed their anti-abortion statutes, it is estimated that at least a third of the women who obtained legal abortions that year were required to travel outside their home state to do so, incurring significantly increased health risks and expense. *Id.* at 3-4.

[21] Bates and Zawadzki, *Criminal Abortion* (1964), p. 3-4.

[22] *See, e.g.*, Decker and Hall, *Treatment of Abortion Infected with Clostridium Welchii*, 95 Am. J. Obst. & Gynec. 394 (1966); Mortiz and Thompson, *Septic Abortion*, 95 Am. J. Obst. & Gynec. 46 (1966); Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion*, 199 J. AMA 805 (1967); Shenoi, Smits and Davidson, *Massive Removal of Small Bowel During Criminal Abortion*, 2 Brit. Med. J. 929 (1966); Studdiford and Douglas, *Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse*, 71 Am. J. Obst. & Gynec. 842 (1956).

[23] Rommer, *Sterility: Its Cause and Its Treatments* 59 (1952).

[24] *See Beal v. Doe*, 432 U.S. 438 (1977) and *Maher v. Roe*, 432 U.S. 464 (1977).

suffering endured by those for whom this right was substantially diminished by the funding decisions.[25] For the 37-year-old AFDC recipient who had 12 previous pregnancies and died of complications after attemping to abort herself with a glass thermometer and the pregnant teenage mother who shot herself in the stomach because she did not have the $600 necessary to pay for an abortion,[26] the absence of safe, legal, available abortion was a matter of life and death.

For all women, irrespective of financial or personal circumstances, the choice between abortion and childbirth may literally be a life or death decision. Between 1972 and 1978, a woman was approximately seven times more likely to die from childbirth than from legal abortion.[27] For abortions up to the 15th week of pregnancy, childbirth is 10 times more likely to result in death than is abortion.[28]

In no other situation has it ever been suggested that the government has the right and authority to demand, or any interest so compelling as to justify forcing, one person to risk their life for another, let alone for the mere potentiality that another person might one day come into existence. The government's position gives precedence to zygotes and embryos over living human beings. It values the existing lives of women less than the potential life within an embryo. It would subordinate the lives of women today and in the future to a single biological function, very much as they were subordinated 100 years ago. This Court recognized as much two years ago in *Akron*.

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[25] *See* Trussel, Menken, Lindheim and Vaughan, *The Impact of Restricting Medicaid Financing for Abortion*, 12 Family Planning Perspectives, No. 3 at 120 (May/June 1980). *See also*, *Women's Health Services, Inc. v. Maher*, 482 F. Supp. 725, 731 & n.9 (D. Conn.), vacated, 636 F.2d 23 (2d Cir. 1980) where the court cited evidence that indigent women could raise the money necessary for abortion only by denying themselves and their families the basic necessities of life.

[26] Trussel, *supra* note 25, at 129.

[27] Le Bolt, Grimes and Cates, *Mortality From Abortion and Childbirth*, 248 J. AMA 188 and 192 (1982).

[28] *Id.* at 196.

At that time, the Court specifically rejected the invitation to give preeminance to the state's interest in preserving potential human life or to measure abortion regulations under a rational basis test because to do either would be "wholly incompatible with existence of the fundamental right recognized in *Roe v. Wade*." *Akron*, 472 U.S. at 420 n.1.

The reality confronting the Court today is the same reality with which it dealt twelve years ago in deciding *Roe v. Wade*. The reality is whether a woman, about whose life and existence there can be no speculation, is entitled to protection from undue governmental interference in the most personal decision affecting her life and well being. As has been demonstrated since *Roe* was decided, it is possible to accommodate the state's interests in maternal health and potential life within an analytical framework that recognizes, affirms and protects the very real and personal right to privacy and liberty that is a cornerstone of our constitutional system. That right must, if it is to mean anything at all, encompass a woman's right to decide whether or not to carry a pregnancy to term. *Amici* urge the Court again to recognize and acknowledge, with at least the same concern afforded the state's interests, the fundamental interest of the woman involved in the abortion decision in exercising effective control over her reproductive functions and, in so many ways, over her very life itself. We urge affirmance of *Roe v. Wade*.

II. THE CHALLENGED PROVISIONS IMPERMISSIBLY BURDEN—AND IN SOME INSTANCES MAY EFFECTIVELY PREVENT—THE EXERCISE OF THE FUNDAMENTAL RIGHT OF A WOMAN TO DECIDE WHETHER OR NOT TO TERMINATE HER PREGNANCY.

This Court repeatedly has held that a statutory scheme which infringes upon a woman's fundamental right to decide to terminate her pregnancy by abortion can survive constitutional scrutiny only if justified by a compelling state interest that is narrowly drawn to express the legiti-

mate state interests at stake.[29] *Roe v. Wade*, 410 U.S. at 155. The Court in *Roe* accepted the assertion by the State of Texas that there are legitimate state interests during the pregnancy in the health of the woman and in protection of potential fetal life.[30] Finding these interests to be separate and distinct, and conflicting with the woman's right to decide to terminate a pregancy, the Court divided pregancy into trimesters, defining the legitimate state interest, and, therefore, the parameters of state interference, at each juncture.

During the first trimester of pregnancy, neither the state's interest in the woman's health nor in potential fetal life can justify *any* state interference with the woman's right to decide. In the second trimester, state intrusion is permissible only if it promotes the state's legitimate interest in ensuring the woman's health. In the third trimester, the state's interest in the potential life of the fetus is sufficient to justify significant intrusion, even a total proscription of abortion, *unless* an abortion is necessary to preserve the life or health of the woman. *Roe*, 410 U.S. at 163-64. Thus, protecting the woman's health is the paramount state interest in the second and third trimesters of pregnancy. When measured against this interest, the challenged restrictions must fail, for they are nothing more than a thinly veiled attempt to limit the availability of abortions, in essence to accomplish through the back door what the Court forbade in *Roe*.

Consistent with the principles set forth in *Roe*, this Court and many others below have invalidated government imposed restrictions that ran afoul of the familiar and

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[29] *See supra*, note 7.

[30] This Court declined to define the point at which life begins. "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe v. Wade*, 410 U.S. at 159. The Court rejected the attempt of Texas to define "life" as beginning at conception and thus to justify state interference throughout the pregnancy.

oft-applied strict scrutiny constitutional standard.[31] Most recently, the Court in *Akron* reviewed restrictive abortion regulations that imposed requirements ranging from hospitalization for post-first trimester abortions to disposal of the remains of an abortion in a "humane and sanitary manner." In its review of these enactments, the Court addressed itself to the validity of the basic *Roe* holding, and found compelling reasons to reaffirm that decision. *Akron*, 426 U.S. at 420 n.1.

The Court again accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.[32] Accordingly, the Court in *Akron* concluded that the government's interest in protecting maternal health did not justify a hospitalization requirement for all second trimester abortions, where that requirement "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." 462 U.S. at 438. The Court also found that the City's regulations governing "informed consent," which required doctors to provide each patient

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[31] *See, e.g., Doe v. Bolton*, 410 U.S. 179 (1973) (requirement that all abortions be approved in advance by a hospital abortion committee); *Danforth*, 428 U.S. 52 (spousal and parental consent requirements); *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), aff'd mem. sub. nom. *Gerstein v. Coe*, 428 U.S. 901 (1976) (spousal and parental consent requirements); *Leigh v. Olson*, 497 F. Supp. 1340 (D.N.D. 1980) (informed consent, 48-hour waiting period and parental notification requirements); *Women's Medical Center of Providence, Inc. v. Cannon*, 463 F. Supp. 531 (D.R.I. 1978) (requirement that physician's have certain hospital privileges); *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D.La 1980) (post-first trimester hospitalization, presumptive viability, parental consent, informed consent and 24-hour waiting period requirements).

[32] The Solicitor General argues that *Akron* signaled a departure from the principles which guided the Court's previous abortion regulation decisions. He relies for this proposition, however, on statements from *Maher* and *Harris v. McRae*, 488 U.S. 497 (1980). Both of these cases involved government restrictions on medicaid funding for abortions, not direct state interference with the right to choose abortion. *See* discussion at pp. 10-11, *supra*.

information "designed not to inform the woman's consent but rather to persuade her to withhold it altogether," were an unconstitutional attempt "to extend the state's interest in ensuring 'informed consent' beyond permissible limits." *Id.* at 444.

The limitations on abortions imposed by the challenged restrictions in the two cases now before the Court attempt to circumscribe a woman's behavior and significantly impair the exercise of her fundamental right to decide whether to bear a child. These restrictions cannot be dismissed as "not burdensome or chilling." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 66 (1976), *citing* 392 F. Supp. at 1374. Nor can they be characterized as merely "state encouragement of . . . childbirth," *Maher v. Roe*, 432 U.S. at 475, or described as placing "no obstacles in the pregnant woman's path to an abortion." 432 U.S. at 474. The statutory schemes enacted by Pennsylvania and Illinois forcefully interject government into a constitutionally protected decision-making process, riding roughshod over individuals' most private decisions. They are aimed at coercing a woman not to terminate her pregnancy by placing obstacles directly in her path.

By intruding directly into the decision-making process at critical points, the method of abortion requirements of the two statutes and the "abortifacient" provision of the Illinois law are intended to coerce and influence a woman to continue her pregnancy. The government seeks to do this irrespective of the reasons for the woman's own choices, and, most indefensibly, without regard to the fact that the pregnancy may be life endangering or health-threatening. These provisions all but preclude the physician's exercise of medical judgment and thus encumber the exercise of the woman's constitutionally protected right "by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice. . . ." *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977) (quoted in *Akron*, 462 U.S. at 445).

A. Pennsylvania's Restriction On Abortion Methods Absent "Significantly Greater" Risk To The Mother Is Void For Vagueness.

Under Section 3210(b) of the Pennsylvania Act, *supra*, it is a felony for a physician performing an abortion on a fetus she has determined to be viable to fail to use the abortion technique "which would provide the best opportunity for the unborn child to be aborted alive unless, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique. . . ." The Third Circuit, relying on this Court's ruling in *Colautti v. Franklin*, 439 U.S. 379 (1979), held the section unconstitutional because it fails to require that maternal health be the physician's paramount consideration in the determination of which abortion procedure to employ. *Thornburgh*, J.S. 68a-71a.

In *Colautti*, the Court had before it certain portions of an earlier version of the Pennsylvania Act before the Court in *Thornburgh*. Section 5a of the predecessor statute required "the physician to employ the abortion technique offering the greatest possibility of fetal survival, provided some other technique would not be necessary in order to preserve the life or health of the mother." *Id.* at 397. This section was found void for vagueness because it was "uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival." *Colautti*, 439 U.S. at 400.

Both the Third Circuit and the district court recognized that the state could not constitutionally require the mother to be at any increased risk in order to save a fetus. *Thornburgh*, J.S. at 69a. They differed, however, in their respective interpretations of the term "significantly greater." The very fact of this difference supports the conclusion that the statute fails to give persons of ordinary intelligence notice of what conduct is forbidden by

the statute and is, therefore, void for vagueness. *See Colautti*, 439 U.S. at 390.

The constitutional standard in this situation, that the mother cannot be required to bear *any* increased risk for the sake of the fetus, is clear. The state easily could have adopted that standard, but chose instead to obfuscate. Use of the phrase "significantly greater," in light of the legislature's stated intent to mandate equality of rights between the mother and the fetus,[33] could only have been meant to require just exactly the trade-off prohibited in *Colautti*. The State's assertion that the provision comes into play "only if there is no meaningful difference in the risks" ignores the plain language of the statute and, in particular, the modification of "greater" by "significantly." This difference is illustrated by considering whether a reference to "any greater risk" means the same thing as a reference to "significantly greater risk." Clearly it does not. The decision of the Third Circuit striking this provision should be affirmed.

B. Section 6(4) Of The Illinois Law, Which Restricts Abortions Prior To Viability, Is Unconstitutionally Overbroad And Is Void For Vagueness.

Section 6(4) prescribes a standard of care for physicians performing abortions in cases where "there exists . . . a possibility . . . of more than momentary survival of the fetus. . . ." [34] Illinois law, *supra*, Section 6(4). This is identical to the standard of care required under Section 6(1) for fetuses known to be viable.[35] The statute im-

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[33] Section 3202(a) and (c) of Pennsylvania Act, *supra*. Brief for Appellants at 1a-5a, *Thornburgh*.

[34] In pertinent part, Section 6(4) requires the physician to "exercise that degree of professional skill, care and diligence to preserve the life or health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born . . . when there . . . exists . . . a possibility known to [the physician] of sustained survival[.]" Ill. Rev. Stat. Ch. 38 ¶ 81-26(4).

[35] The Court of Appeals held Section 6(1) was unconstitutionally vague because it failed to specify that the attending physician's determination of fetal viability was controlling, and failed to give

poses criminal sanction on the physician or assistant who intentionally breaches this standard of care. The Court of Appeals declared this statute unconstitutional because it seeks to regulate abortions on behalf of the fetus prior to viability and infringes on a woman's right to privacy. *Diamond*, J.S. App. 32-36. This decision should be affirmed.

A viable fetus is one which is [capable] of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163. In *Roe*, this Court recognized a compelling state interest in potential life at viability which permits the state to proscribe abortions altogether except when necessary to protect the life and health of the mother. 410 U.S. at 163, 164. Prior to viability, however, the state may only regulate the abortion procedure to the extent that such regulations are "reasonably related to maternal health." 410 U.S. at 164.

1. *Section 6(4) Is Unconstitutionally Overbroad Because It Seeks To Regulate Abortions Based On The State's Interest In "Potential Life" Prior To Viability.*

In *Danforth*, this Court struck down a statute which imposed on the physician a standard of fetal care applicable to all abortions on the ground that it was unconstitutionally overbroad. In pertinent part, the statute required the physician to use the same "degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." 428 U.S. at 82. This Court held that such a provision "impermissibly requires the physician to preserve the life and health of the fetus, whatever the stage of pregnancy." 428 U.S. at 83. The State does not have a compelling interest in the fetus prior to viability and, therefore, may not regulate the abortion procedure on behalf of the fetus before via-

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physicians and their assistants explicit notice as to what the statute prohibited. *Amici* urge affirmance of this holding.

bility is reached. *Roe*, 410 U.S. at 164; *Danforth*, 428 U.S. at 82-83.

Similar restrictions were at issue in *Colautti*. There, the statute imposed a standard of care toward the fetus whenever the physician determined that the fetus was "viable" or "may be viable." 439 U.S. at 391. The Court held that the statute was ambiguous and therefore void for vagueness, because it concluded that "viable" and "may be viable" referred "to distinct conditions, and that one of these conditions differs in some indeterminate way from the definition of viability as set forth in *Roe* and *Planned Parenthood*." *Id.* at 393 (footnote omitted). It did not decide, therefore, whether the provision also was overbroad. The District Court in *Colautti*, however, did consider the overbreadth issue. It held that the "may be viable" provision was a clear attempt by the state to regulate abortions during the second trimester, "when it may lawfully do so only in the interest of maternal health." 401 F. Supp. 554, 572 (1975).

The Seventh Circuit, rather than finding both Section 6(1) (governing a viable fetus) and 6(4) void for vagueness, upheld Section 6(1) and found Section 6(4) unconstitutionally overbroad. Assuming that the Seventh Circuit was correct in finding that the viability aspect of Section 6(1) is constitutional, the conclusion that Section 6(4) is unconstitutional necessarily follows. Section 6(4) can only be interpreted as intended to "carve out a new time period during pregnancy when there is a remote possibility of fetal survival outside the womb, but the fetus has not yet attained the reasonable likelihood of survival that physicians associate with viability." *Colautti*, 439 U.S. at 393. Clearly, Section 6(4) is an attempt to whittle away the rights of the woman recognized in *Roe* and affirmed in *Akron*. It is, as appellants concede, an attempt to extend regulations to protect potential life earlier into pregnancy than can be justified based on any compelling interest.[36] As such, Section 6(4) is a blatant

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[36] Appellants argue that even if the State's interest in the fetus is not compelling until viability, it is still substantial prior to via-

and impermissible attempt to circumvent the prior rulings of this Court. It cannot withstand the strict judicial scrutiny mandated by *Roe*. The decision of the Seventh Circuit must be affirmed.

2. *Section 6(4) Is Void For Vagueness.*

The ambiguity surrounding the "possibly viable" standard in the case at bar is identical to that "undefined penumbral" or "gray area" surrounding *Colautti*'s "may be viable" standard. *Colautti*, 439 U.S. at 391. This vagueness has a "chilling effect" on the willingness of physicians to perform second trimester abortions and risk criminal liability.[37] If upheld, it would eviscerate a woman's ability to exercise her fundamental right to decide to choose abortion.

A statute is void for vagueness if it fails to inform persons of ordinary intelligence what conduct it forbids. *United States v. Harris*, 347 U.S. 612 (1954). Particularly with respect to criminal statutes that abut fundamental constitutional rights and which, if unclear or imprecise, will inhibit the exercise of those rights, the State must proceed with clarity and precision. *See Colautti*, 439 U.S. at 390-92. Where it fails to do so, as in the case at bar, the statute is void for vagueness.

C. Sections 2(10) And 11(d) Of The Illinois Law Impermissibly Infringe Upon A Woman's Right To Privacy In Decisions Regarding Birth Control And Are Void For Vagueness.

Under the guise of protecting women from their physician's prescription of birth control substances or devices that they may not want to use, the State of Illinois made it a crime for a physician who prescribes or administers an "abortifacient" to fail to advise the patient that he

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bility. *Amici* submits that even if such an interest does exist, which we believe it does not, that interest is not sufficient to overcome the woman's fundamental right to determine whether or not to carry a pregnancy to term.

[37] *See* Affidavits of Allan G. Charles, M.D. and Martin Motew, M.D., *Diamond*, Joint Appendix at 3 and 54.

has done so. The statute defines "abortifacient" as "any instrument . . . known to cause fetal death . . . whether or not the fetus is known to exist when such substance or device is employed." Illinois law, *supra*, Sections 2(10) and 11(d).

With this regulation, Illinois adds a new dimension to the struggle to preclude women from exercising control over their own reproductive functions, and hence, their lives. Although the tactic they use may be new to this particular struggle, it is one with which women have much experience. It is one that suggests that women, for any number of reasons, need special protection to save them from disadvantage in their dealings with the world. Hence, we are told that women must be protected from doctors who would prescribe drugs or devices for them without first explaining to them the effect such instruments will have.

Not surprisingly, however the need for such protection arises only with regard to drugs or devices that operate to cause a fertilized ovum to be expelled from the woman's body; and only as to the effect such drugs or devices will have on the fertilized ovum—not the effect they may have on the woman. Thus, the physician who prescribes for a woman an intra-uterine device is compelled by special "protective" legislation to inform the woman that the device is an abortifacient that will cause expulsion of a fertilized ovum should one develop, but incurs no criminal liability for the failure to inform the patient that the device could render *her, the patient,* sterile and cause *her, the patient,* death.[38]

Thus, the Illinois abortifacient provision either is the type of protective legislation which for years protected only women's second class citizenship, and not women, or it is legislation designed to protect the fertilized ovum from inadvertent destruction. Given the legislature's

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[38] *See* J. Williams, *Williams Obstetrics* 1024 (J. Pritchard and P. MacDonald 16th ed. 1980). Death from sepsis is noted as one of the complications that has been observed in connection with IUD use.

stated concern for "the unborn child . . . from the time of conception" and the compelling interest it claims in that "unborn child,"[39] it is clear that the focus of the state's concern in enacting these provisions was, in fact, the fertilized ovum and not the woman. From *Roe*, it is clear that the state has no compelling interest in such an organism. *Amici* submit, moreover, that the state has no legitimate interest at all in such an organism. Neither its concern for the fertilized ovum, nor any actual concern for the health of the woman, justifies the statute's invasion of the fundamental privacy rights that protect personal, procreative decisions from excessive governmental interference.

1. *The State May Not Regulate Abortion Based On The State's Theory Of Life.*

Section 11(d) requires physicians to advise their patients when, as defined in the law, they are prescribing an abortifacient for their patient. For all practical purposes, the only way a physician can be certain that she or he is complying with this statute is to explain to the patient, in the terms of statute, what it is they are prescribing. The fact that the statute does not specify in so many words the precise language to be used by the physician is, therefore, of little significance given the overall statutory framework. Problems will arise for the physician when she or he is asked to explain, as will surely happen, *what it means* to be told that an "abortifacient" is being prescribed. What it means, according to the statute, is that the drug or device will kill the patient's fetus, which the State believes is an unborn child. Thus, there is no escaping the conclusion that the statute does require the physician "to become the mouthpiece for the State's theory of life." *Charles v. Carey*, 627 F.2d 772, 789 (7th Cir. 1980). As such, it falls squarely within the bounds of this Court's rulings in *Roe* and *Akron* prohibiting such state interference with the woman's decision whether to terminate a pregnancy.

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[39] *See* Brief of Appellants at 1a-2a, *Diamond*.

In addition, these provisions, like those defining "informed consent" in terms of specific information that must be provided by the physician to the patient, places the physician in the "undesired and uncomfortable straitjacket" about which this Court warned in *Danforth*, 428 U.S. at 67 n.8. The abortifacient provisions are simply another obstacle that the state wants to place in the physician's path in order to limit her or his discretion in advising a woman about her reproductive health needs. These provisions force the physician to accept definitions of medical and physiological terms on which, at the very least, there is no concensus.[40] What appellants describe as attempts to blur the distinctions between abortifacients and contraceptives[41] are in fact commentaries which reflect that all physicians do not agree that conception and pregnancy occur at the instant a sperm penetrates an ovum.[42] The physician who believes that conception occurs over time and that a woman is not pregnant until the fertilized ovum implants in the uterus must, nevertheless, advise the patient based on the state's theory of conception as occurring at a single point in time. This is exactly what the Court prohibited in *Danforth* and *Akron*. Thus, the "abortifacient" regulation must fall.

2. *The "Abortifacient" Provision Is Void For Vagueness.*

As set forth above, criminal statutes which threaten to inhibit the exercise of constitutionally protected rights

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[40] The evidence before the trial court included several physician's affidavits which stated, *inter alia*, that the definition of abortifacient in Section 2(10) is "medically unjustified," and "scientifically questionable." Affidavits of Drs. Charles, Zbaraz and Motew, Joint Appendix at 4, 22 and 50, *Diamond*.

[41] Brief of Appellants at 13 and n.6, *Diamond*.

[42] It has been noted that it is difficult to determine the incidence of spontaneous abortion since there is no agreement on when a pregnancy actually begins. It could be at almost any point between penetration of the ovum by a sperm to implantation of the blastocyst in the endometrium. *See* Williams, *supra* note 38, at 588. *See also*, *Roe*, 410 U.S. at 130-34 and n.22 and 159-62; and, Tribe, *supra*, note 10, at 18-21 and nn.86-94.

must be carefully and precisely drawn. Given the uncertainties that exist regarding "fertilization" and "conception" and how various methods of birth control actually work,[43] the subject provisions fall far short of minimum due process requirements.

At best, the statute is internally inconsistent. Abortion is defined as the intentional termination of a known pregnancy. Illinois law, *supra*, Section 2(6). Thus, if there is no known pregnancy, there can be no abortion. The statute, however, defines abortifacient as any instrument that would destroy the fertilized ovum, regardless of whether it was known to exist. *Id.*, Section 2(10). Assuming, as Appellants claim, however, that an abortifacient is something that causes an abortion [44] the statute's definition of abortifacient is completely at odds with the statute's definition of abortion.[45] One cannot cause an abortion unless there is a known pregnancy, and there is no known pregnancy at least until the process of conception is completed through implantation.[46] Thus, even as appellants and the Solicitor General [47] understand and explain these provisions, when taken together they do not make sense and cannot be justified on the ground of protecting women from abortions. So inconsistent a hodgepodge of medically insupportable and contradictory definitions upon which vague obligations are premised cannot possibly meet even minimal due process requirements, let

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[43] Williams, *supra* note 38, at 1012, indicates that most birth control pills act in multiple ways to prevent contraception, including preventing ovulation and/or implantation. Similarly, the contraceptive actions of intra-uterine devices "have not been precisely defined." Id. at 1021.

[44] Brief of Appellants at 11 and n.3, *Diamond*.

[45] See also physician's affidavits, *supra* note 40.

[46] Most pregnancy tests in clinical use are usually positive by the 3rd week after ovulation. Implantation of the blastocyst generally begins at the end of the first week after ovulation. Williams, *supra* note 38, at 170.

[47] *See* S.G. Brief at 14-15.

alone those imposed upon criminal statutes which infringe fundamental rights. Thus, the decision of the Seventh Circuit must be affirmed.

CONCLUSION

Amici urge this Court to affirm that the fundamental constitutional right of privacy protects the right of women to make reproductive choices without oppressive and burdensome state interference. Without this fundamental right women are denied the ability to control their own lives. We submit that the government's position not only is indefensible, but if accepted would have disastrous results for the lives and well-being of all American women. Thus, we urge the Court, once again, to affirm unequivocably its holding in *Roe v. Wade*. Furthermore, for the reasons set forth above, we urge the Court to affirm the decisions of the Third and Seventh Circuits regarding the method of abortion and abortifacient provisions of the respective state statutes.

Respectfully submitted,

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Dated: August 29, 1985

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[48] Counsel wishes to acknowledge the assistance of Loren Chumley, a student at American University School of Law, in the preparation of this brief.

APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The NATIONAL ORGANIZATION FOR WOMEN (NOW) is a national membership organization of approximately 250,000 women and men in about 750 chapters throughout the country. NOW has as one of its priorities the preservation of the right to reproductive freedom, including abortion. NOW believes that every woman has a fundamental constitutional right to decide whether to terminate her pregnancy by abortion. NOW submits that this fundamental right must be affirmed and that the restrictions challenged herein impermissibly impinge upon this constitutionally protected right.

HUMAN RIGHTS FOR WOMEN, INC. (HRW) is a non-profit organization dedicated to attaining equal rights for women in every aspect of life. The organization provides volunteer legal assistance in litigation involving rights of women; researches issues relevant to discrimination against women; and provides for educational projects on conditions of concern to women. HRW believes that laws which deny or severely limit the availability of abortion, such as those before the Court in these cases, deny women their right to self-determination as human beings.

EQUAL RIGHTS ADVOCATES, INC. (ERA) is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through our particiaption as counsel and as *amicus* in numerous cases involving women's reproductive rights.

THE LEAGUE OF WOMEN VOTERS FOR THE UNITED STATES (LWVUS) is a national, nonpartisan,

non-profit membership organization, incorporated under the laws of the District of Columbia, with a current membership of 110,000 in 1,250 state and local Leagues in all states, the District of Columbia, Puerto Rico and the Virgin Islands. Since being founded in 1920, the LWVUS's purpose has been to promote political responsibility through informed and active participation of citizens in government. The LWVUS strongly believes that public policy in a pluralistic society must affirm the constitutional right of privacy of the individual to make reproductive choices. The LWVUS further believes that the *Roe v. Wade* decision is an important protection of this constitutional right.

THE NORTHWEST WOMEN'S LAW CENTER is a non-profit Washington State organization dedicated to securing equal rights for women through the law. The Northwest Women's Law Center provides the only sustained effort in the Pacific Northwest serving the legal needs of women from all socio-economic backgrounds. The Law Center has participated in significant cases before state and federal courts involving issues which have a major impact on women, and specifically has participated as *amicus curiae* in several cases which focused on the constitutionality of legislation hindering the exercise of a woman's right to decide whether to terminate a pregnancy.

THE NATIONAL WOMEN'S LAW CENTER is a Washington, D.C.-based legal organization which has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. The fundamental right to abortion recognized in *Roe v. Wade* is of profound importance to the lives, liberty, health and safety of women throughout the country. Because of the tremendous significance to women of the freedom to choose whether to bear children, the National Women's Law Center seeks to preserve women's right to abortion.

THE NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF) was founded in 1970 by leaders of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF has participated as *amicus* before this and other courts in several cases involving women's reproductive rights.

THE WOMEN'S LEGAL DEFENSE FUND (WLDF) is a non-profit, tax-exempt membership organization founded in 1971 to provide *pro bono* legal assistance to women who have been discriminated against on the basis of sex. The right of women to decide for themselves whether or when to bear children is essential to women's achievement of full equality in our society. WLDF is committed to helping women achieve that equality and has participated as *amicus* before this Court and others in cases where the right to choose abortion has been challenged.

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In the
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OCTOBER TERM, 1985.

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ALLAN G. CHARLES, ET AL.
APPELLEES

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS.

Brief Amicus Curiae of Senator Bob Packwood (R-Ore.), Representative Don Edwards (D-Calif.) and Certain Other Members of the Congress of the United States in Support of Appellees.

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Interest of Amici.

Amici are 81 members of the Congress of the United States, as follows:

Rep. Gary L. Ackerman (D-N.Y.), Rep. Glenn M. Anderson (D-Calif.), Rep. Chester G. Atkins (D-Mass.), Rep. Les

AuCoin (D-Ore.), Rep. Howard L. Berman (D-Calif.), Rep. Anthony C. Beilenson (D-Calif.), Rep. Barbara Boxer (D-Calif.), Sen. Bill Bradley (D-N.J.), Rep. George E. Brown, Jr. (D-Calif.), Rep. Sala Burton (D-Calif.), Sen. John H. Chafee (R-R.I.), Rep. Cardiss Collins (D-Ill.), Rep. John Conyers, Jr. (D-Mich.), Rep. George W. Crockett, Jr. (D-Mich.), Rep. Ronald V. Dellums (D-Calif.), Rep. Julian C. Dixon (D-Calif.), Sen. Christopher J. Dodd (D-Conn.), Rep. Thomas J. Downey (D-N.Y.), Rep. Mervyn M. Dymally (D-Calif.), Rep. Bob Edgar (D-Pa.), Rep. Don Edwards (D-Calif.), Sen. Daniel J. Evans (R-Wash.), Rep. Lane Evans (D-Ill.), Rep. Dante B. Fascell (D-Fla.), Rep. Vic Fazio (D-Calif.), Rep. Barney Frank (D-Mass.), Sen. Barry Goldwater (R-Ariz.), Rep. William H. Gray, III (D-Pa.), Rep. Bill Green (R-N.Y.), Rep. Augustus F. Hawkins (D-Calif.), Rep. Charles A. Hayes (D-Ill.), Sen. Daniel K. Inouye (D-Hawaii), Sen. Nancy Landon Kassebaum (R-Kan.), Rep. Robert W. Kastenmeier (D-Wis.), Sen. Edward M. Kennedy (D-Mass.), Sen. John F. Kerry (D-Mass.), Sen. Frank R. Lautenberg (D-N.J.), Rep. Richard H. Lehman (D-Calif.), Rep. William Lehman (D-Fla.), Rep. Mickey Leland (D-Tex.), Rep. Sander M. Levin (D-Mich.), Rep. Mel Levine (D-Calif.), Rep. Mike Lowry (D-Wash.), Rep. Stan Lundine (D-N.Y.), Rep. Edward J. Markey (D-Mass.), Rep. Robert T. Matsui (D-Calif.), Rep. John R. McKernan, Jr. (R-Maine), Rep. Stewart B. McKinney (R-Conn.), Sen. Howard M. Metzenbaum (D-Ohio), Rep. George Miller (D-Calif.), Rep. Norman Y. Mineta (D-Calif.), Rep. Parren J. Mitchell (D-Md.), Rep. Jim Moody (D-Wis.), Rep. Bruce A. Morrison (D-Conn.), Rep. Robert J. Mrazek (D-N.Y.), Rep. Major R. Owens (D-N.Y.), Sen. Bob Packwood (R-Ore.), Rep. Claude Pepper (D-Fla.), Rep. Charles B. Rangel (D-N.Y.), Rep. Gus Savage (D-Ill.), Rep. James H. Scheuer (D-N.Y.), Rep. Claudine Schneider (R-R.I.), Rep. Patricia Schroeder (D-Colo.), Rep. Charles E. Schumer (D-N.Y.), Rep. John F. Seiberling (D-Ohio), Rep. Olympia J. Snowe (R-Maine),

Rep. Stephen J. Solarz (D-N.Y.), Rep. Fortney H. Stark (D-Calif.), Rep. Louis Stokes (D-Ohio), Rep. Gerry E. Studds (D-Mass.), Rep. Edolphus Towns (D-N.Y.), Rep. Robert G. Torricelli (D-N.J.), Rep. James A. Traficant, Jr. (D-Ohio), Rep. Morris K. Udall (D-Ariz.), Rep. Henry A. Waxman (D-Calif.), Rep. James Weaver (D-Ore.), Sen. Lowell T. Weicker, Jr. (R-Conn.), Rep. Ted Weiss (D-N.Y.), Rep. Alan Wheat (D-Mo.), Rep. Howard Wolpe (D-Mich.), Rep. Sidney R. Yates (D-Ill.).

As members of a co-ordinate branch of government, sworn to uphold the Constitution in the face of the most intense political controversy, *Amici* submit this brief[1] in the conviction that the vision of the judicial function and of individual liberty espoused by the Government in these cases is radically at odds with the written Constitution, with the position urged heretofore by the United States in this Court, and with the judiciary's traditional role as a principled and independent guardian of constitutional liberties.

Summary of Argument.

The Government, in urging that *Roe* v. *Wade* be overturned, has taken an extraordinary and unprecedented step. For the first time in the history of the Solicitor General's office, in a case in which the United States is not even a party, and a case in which the issue was not presented by the parties, the Department of Justice has urged the repudiation of a liberty long since declared fundamental by this Court.

The Government would have the Supreme Court toss into the political arena the right to choose between childbirth and abortion. For little reason beyond the indisputable difficulty of the issues posed and the intense controversy invited, the Government would relegate this delicate constitutional matter to shifting political majorities in the 50 state legislatures, yielding a bizarre quilt of wildly varying state laws. Whatever

[1] Counsel for all parties have consented to the filing of this brief. Letters indicating consent have been filed with the Clerk.

rights women might have in this matter would be disregarded in some states; whatever rights the unborn are thought to possess would be ignored in others. On a previous occasion when the nation was deeply divided over a different issue of fundamental liberty, Abraham Lincoln warned that the Union could not long endure "half slave and half free."[2]

The Government's ill-conceived resolution of the abortion controversy would not only fragment our constitutional order but turn it on its head. For it is precisely the task of this Court to insulate conflicting claims of individual right from the changing winds of politics. As in the case of school desegregation, it is often when public sentiment is most sharply divided that the independent judiciary plays its most vital national role in expounding and protecting constitutional rights. As the Chief Justice wrote in *Brown* v. *Board of Education* (*Brown II*), 349 U.S. 294, 300 (1955), "[t]he vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them."

Argument.

1. Only recently, in *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983), this Court enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*:"

> That case was considered with special care. It was first argued during the 1971 Term, and reargued — with extensive briefing — the following Term. The decision was joined by the Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal

[2] Speech in Springfield, Illinois (June 16, 1858).

choice whether or not to terminate her pregnancy. *See Connecticut* v. *Menillo*, 423 U.S. 9 (1975); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Harris* v. *McRae*, 448 U.S. 297 (1980); *H.L.* v. *Matheson*, 450 U.S. 398 (1981).

In the name of "democratic self-governance,"[3] and in supposed analogy to this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Government — which had urged *stare decisis* in *Garcia* — now invites this Court to overrule *Roe* v. *Wade*, 410 U.S. 113 (1973). In so moving, the Government describes that decision as merely another "formulation affecting the allocation of constitutional powers" that has supposedly "proven 'unsound in principle and unworkable in practice.'" GB 21. But the Government adduces no relevant consideration that was not available in 1973[4] and points to no relevant development subsequent to *Akron* in 1983. More importantly, the Government's decision to treat the holding in *Roe* v. *Wade* as effecting only an "allocation of constitutional powers" utterly fails to distinguish between determining the proper distribution of power within government and defining the boundary that

[3] Government Brief ("GB") at 1.

[4] The protracted controversy to which the Government points hardly distinguishes the current situation from that which the Court confronted as early as 1973. Nor does the Government explain why a judgment made by application of fundamental constitutional principles should yield in the face of a measure of public dispute, or suggest how overruling *Roe* v. *Wade* could be expected to replace controversy with consensus.

separates the sphere of governmental power from the sphere of individual autonomy.

2. Stripped to its essentials, the Government's contention is that state legislatures should be accorded judicially unrestricted latitude in defining — and, if they choose, infringing — fundamental rights in this area. The "efforts of . . . state legislatures to balance the competing interests at stake in the abortion decision," GB 1, are described as though fundamental rights could properly be reduced to political interests. That may well be the case under a parliamentary government where the legislative will is supreme,[5] but it ignores the choice of a fundamentally different form of government that was made for us nearly two centuries ago:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .
>
> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. . . . [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence . . . withhold the judg-

[5] "The primary argument against a Bill of Rights [for Great Britain] is that it would . . . remove from Parliament a decision-making capacity which rightly belongs to Parliament. Disputes as to encroachments on fundamental rights are essentially political disputes and must be resolved politically, not judicially." P. Norton, *The Constitution In Flux* 253 (1982).

> ment that history authenticates as the function of this Court when liberty is infringed.[6]

Our entire history has made clear that, where controversy is greatest, so also are the dangers of majoritarian excess and the need for protection under the Constitution by an independent and principled judiciary. *See, e.g., United States* v. *Nixon,* 418 U.S. 683 (1974); *New York Times* v. *United States,* 403 U.S. 713 (1971); *Cooper* v. *Aaron,* 358 U.S. 1 (1958).

3. There is no claim that the deference to state legislatures for which the Government here clamors should be limited to abortion cases; nor could any such argument be made. The force of the Government's current analysis would be fully applicable whenever this Court is called upon to enforce constitutional rights on a case-by-case basis, and to draw the ever-finer lines that are necessitated by recurring instances of state or local resistance. In effect, the Government's position applies to constitutional rights to attend an integrated public school; to express unpopular political views; to decide whether to use contraception or, in consultation with a doctor, terminate a pregnancy. In each of these — and other — instances of constitutional liberties, the Government would evidently vest state and local legislatures with substantial power to define, or to ignore, the meaning of the United States Constitution.

The Government adduces no principled distinction between any of these fundamental rights and the fundamental right of privacy, for which the Government here urges a new federalism. Indeed, the more controversial the particular exercise of rights, the more willing the Justice Department seems to relegate the meaning of the Constitution to the state legislatures. This cannot be what the constitutional framework mandates.

4. In this case, like *Akron,* the litigants initially called upon this Court only to construe, not reexamine, *Roe* v. *Wade* itself.

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[6] *West Virginia Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 638, 639-640 (1943).

But here, in contrast to its position in *Akron*,[7] the Government nonetheless urges such reexamination. It is perhaps unsurprising that a controversial precedent would be selected to carry this gratuitous plea for radical surgery on our form of government. But the results of such surgery would be felt throughout the body politic. For it is axiomatic that the undoing of one aspect of fundamental liberty threatens the protection of individual rights in every phase of American life. However desirable it might be for the states to experiment with traffic laws or liquor regulations or other quotidian matters, any "experiment" with our most basic liberties, as James Madison counseled two centuries ago, is cause only for immediate "alarm."[8]

5. The Government's current position invites just such an experiment — on the supposed authority of *Garcia*, even though the issue here is one readily distinguishable from anything at issue in *Garcia*. For that decision dealt only with "the allocation of constitutional powers" *within* government — *not* with the underlying distribution of power *between* government and the individual. Thus, in *Garcia*, this Court engaged in lively debate over the question of whether and to what degree the rights of *states*, as distinct from those of individuals, could properly be left to the national legislature for protection, relying on "the built-in restraints that our system provides through state participation in federal governmental action [to ensure] that laws that unduly burden the States will not be promulgated"

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[7] In argument before this Court in *Akron*, the Solicitor General expressly refrained from asking the Court to overrule *Roe* v. *Wade*:
Question: Mr. Solicitor General, are you asking that *Roe* v. *Wade* be overruled?
Mr. Lee: I am not, Mr. Justice Blackmun.
Question: Why not?
Mr. Lee: That is not one of the issues presented in this case, and as amicus appearing before the Court, that would not be a proper function for us. Tr. Oral Arg. p. 21.

[8] J. Madison, "Memorial and Remonstrance Against Religious Assessments," in *Everson* v. *Bd. of Education*, 330 U.S. 1, 65 (1947) (Appendix, Rutledge, J., dissenting).

in the first instance. 105 S.Ct. at 1020 (majority opinion). *Cf. id.* at 1025-26 & n.9 (dissenting opinion). But it was common ground for this Court in *Garcia* that no such question could even arise with respect to the rights of *individuals*: "One can hardly imagine this Court saying that because Congress [or a state legislature] is composed of [or represents] individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process." *Id.* at 1025 n.8 (Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, JJ., dissenting).

The repudiation of *National League of Cities* in *Garcia* represented only a determination that, with respect to the sovereign rights of *states*, this Court should return to its pre-1976 tradition of depending — within certain still-to-be elaborated "affirmative limits," *id.* at 1020 — on "the structure of the Federal Government itself" to defend the Constitution's boundaries on national legislative authority. *Id.* at 1018. Whether that determination was right or wrong, it bears no resemblance to the truly extraordinary suggestion that, with respect to the rights of individual *persons*, this Court should inaugurate the practice of depending on "ordinary politics . . . to settle disputes of value and vision" going to the very *content* of what those individual rights *are*. GB 30. Far from restoring to Congress this Court's long-standing allocation of responsibility for the claims of states *qua* states, the proposed overruling of *Roe* v. *Wade* would rest on a wholly novel investiture in state legislatures of an essentially unreviewable power to dispose of the competing claims of right advanced by individuals under the fundamental right of privacy — an investitute utterly alien to our Constitution.

6. To be sure, this suggestion is couched in the form of an ostensibly modest recommendation that this Court "return the law to the condition in which it was before *Roe* v. *Wade* was decided." GB 24. But that simply begs the question. For, unless the "condition" of the law, prior to the 1973 abortion

decision, indeed entrusted state legislatures with judicially unreviewable and constitutionally unfettered control over personal matters of family composition and reproductive choice, what the Government proposes would *not* be merely a restoration of the *status quo ante* but a revocation of the very principles from which *Roe* v. *Wade* sprang. For the Court now to overrule *Roe* v. *Wade* would then be not just "a significant step backwards," *cf. Runyon* v. *McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring), but a repudiation of the 50-year path along which this Court located its 1973 abortion ruling.

7. The central question to be addressed, then, is whether an overruling of *Roe* v. *Wade* would, as the Government asserts, merely turn the clock back to 1973 by erasing what it calls "an erroneous point of departure," GB 2, from the "generally propitious journey," *id.*, along which constitutional law had traveled up to 1973 — or whether *Roe* v. *Wade* was instead a natural step along that journey,[9] so that its overruling would entail a far more substantial retreat, propelling the Court and the country onto a legal landscape from which not only *Roe* but many of its important antecedents, and the protections they provide for us all, would tragically be absent.

8. That *Roe* was indeed a natural outgrowth of a gradual process of legal evolution can hardly be doubted. Its origins, as the Court made clear in the *Roe* opinion, included a series of landmark Supreme Court rulings affirming for all of us the liberty to decide for ourselves when and whether to marry, *see Loving* v. *Virginia*, 388 U.S. 1 (1967), how to raise and educate our children, *see Meyer* v. *Nebraska*, 262 U.S. 390

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[9] The carefully selected citations of academic commentators on *Roe* v. *Wade*, see GB 24 n.4, certainly do not show the contrary. The "broad spectrum of constitutional scholars" said by the Government to share its "judgment" that *Roe* v. *Wade* rested on a "basis . . . so far flawed that this Court should overrule it," *id.* (footnote omitted), is particularly misleading in its calculated exclusion of all the scholars who have written in support of the basic holding in *Roe*.

(1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and how much of our most personal lives to disclose to the world, *see Katz* v. *United States*, 389 U.S. 397 (1967), as well as the right to decide whether to conceive or bear children, *see Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). These decisions comprehensively protect our rights both to be left alone by government and to choose how to conduct our own lives. To overturn *Roe* v. *Wade* as the Government urges thus would turn the clock back not just to 1973 but to a point prior to 1923; it would not only deprive women of their fundamental liberty, but would also cast into grave doubt the continuing validity of every one of the Court's half-century of privacy decisions, which protect us all.

9. To resist this conclusion, the Government suggests that *Roe* v. *Wade* represented an unwarranted leap beyond the many "'privacy' cases that the Court cited" in that decision. GB 28. The inference is that the Court could simply jump back to the point from which *Roe* had supposedly "leapt." But the "story" the Government would have the privacy cases tell, *id.* at 27 — in contrast to the message this Court read in them — is strange indeed. As the Government would have it, for example, this Court's 1965 decision striking down a state ban on contraception, *Griswold* v. *Connecticut*, 381 U.S. 479, represented little beyond judicial protection of the "'privacy of the home.'" GB 28 n.6. The Government has evidently mistaken Justice Douglas' evocative language in *Griswold* — "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[10] — for the actual holding in that case. It has long been understood that even the Fourth Amendment, into whose Procrustean bed the Government seeks to shove *Griswold*, "protects people, not places," *Katz* v. *United States*, 389 U.S. 347,

[10] 381 U.S. at 485.

351 (1967). And even before *Katz* was decided, this Court recognized in *Griswold* itself that what was being protected was not the sanctity of the suburban bedroom, but the "intimacies of the marriage relationship." 381 U.S. at 502-03 (White, J., concurring); *see id.* at 482, 486 (opinion of the Court); *id.* at 486, 495 (Goldberg, J., concurring).

Even if we accept *arguendo* the Government's misreading of *Griswold*, the Government still cannot simultaneously defend that case and urge that this Court cede to state legislatures a judicially uncontrollable power to prohibit all abortion, from the "moment" of conception, whether performed surgically or through the use of "a substance or device" that operates as an "abortifacient." GB 14. Any such power, notwithstanding the Government's bald assertion to the contrary, would necessarily entail an even greater risk of the "repulsive searches," GB 28 n.6, that the Government adduces in support of this Court's holding in *Griswold*. *Roe* relied heavily on *Griswold* in no small part because of the "problems . . . posed . . . by new embryological data that purport to indicate that conception is a 'process' over time, rather than an event, and by new medical techniques such as menstrual extraction, the 'morning-after' pill, implantation of embryos, artificial insemination, and even artificial wombs." 410 U.S. at 161 (footnote omitted). In the biological context of human conception, state efforts to ferret out prohibited abortions — as defined by the Government — would require not only searches of bedrooms for telltale "morning-after" pills, but also searches of women's bodies for intrauterine devices or other birth control technologies that operate during or after fertilization.

10. In any event, the Government's absurdly narrow conception of privacy is flatly at odds with this Court's unbroken line of precedent. No risk of overbearing searches was entailed in *Griswold's* other direct progeny, *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), which the Government oddly describes as merely applying "accepted principles . . . of equal protection,"

GB 29 (footnote omitted),[11] and *Carey* v. *Population Services International*, 431 U.S. 678 (1977), or in the other antecedents of *Roe* v. *Wade* — the decades of decisions, beginning as early as 1923 and continuing through the 1960s, establishing a sphere of individual freedom over intimate matters of reproduction, parenting, and family structure. The Government's efforts to sweep these long-standing precedents under the rugs of equal protection and freedom of expression, GB 29, must, with all respect, be described as ill-informed or worse. For nothing in the demand that government rule impartially, or in the requirement that it tolerate dissent, could remotely explain this Court's unbroken line of holdings, both before *Roe* v. *Wade*[12]

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[11] *Baird* struck down a state statute making it illegal for single persons, but not for married persons, to obtain contraceptives in order to prevent pregnancy. Virtually every commentator on the case, including the very authors the Government cites in its brief, *see* GB 24 n.4, has recognized that *Baird* cannot be defended in standard "equal protection" terms but rests unavoidably on the premise that there exists a special freedom to obtain and use contraceptives — a freedom that goes beyond both the marital relationship and the privacy of the home. *See, e.g.*, J.H. Ely, *Democracy and Distrust* 126 n. (1980); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 34-36 (1972); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *Yale L. J.* 221, 296-97 (1973). To describe this case as a standard application of settled equal protection principles is to ignore this analysis — and to ignore the Court's own words in *Baird*: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453 (emphasis in original).

[12] To dismiss such decisions as *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), for example, as simple First Amendment cases, *see* GB 29 n.8, is little short of astonishing. The First Amendment had not yet been applied to the states when those opinions were written; their explicit invocation of parental and family autonomy, rather than freedom of expression, to explain the Court's invalidation of state laws interfering with the education and upbringing of children was properly stressed as decisive by Justice Harlan in his landmark analysis of *Meyer* and *Pierce*. See

and after,[13] unless one were to posit judicially enforceable rights of individuals and families to shape their future, to determine their composition, and to decide whether to bring children into the world — even when local or statewide political majorities would decree different choices.

11. That these rights may be no more than "implied and inchoate" in the Constitution's text, structure, and history, GB 27, and may not be as "directly rooted in textually specified constitutional values" as are some other rights, *id.* at 28, is beside the point in a Constitution whose very text specifies that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Amendment IX. Indeed, the position the Government invites this Court to take would directly violate the rule of construction mandated by the Ninth Amendment.

12. That the Constitution's text provides, in its "liberty" clause, the essential starting point for the judicial development of the series of rights this Court has protected from 1923 through *Roe* and beyond is not open to dispute. Thus, as the Government recognizes, "[t]he ultimate textual source for *Roe* v. *Wade* . . . is the Fourteenth Amendment's guarantee: 'nor shall any State deprive any person of . . . liberty . . . without

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Poe v. *Ullman*, 367 U.S. 497, 550-52 (1961) (dissenting opinion). And to dismiss *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), as just another equal protection case, *see* GB 29 n.7, is hardly less remarkable, given the *Skinner* Court's explicit reliance upon reproductive freedom as "one of the basic civil rights of man," 316 U.S. at 541, in justifying its unusually strict scrutiny of the Oklahoma criminal sterilization law's distinction between larcenists and embezzlers.

[13] *See, e.g.*, *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (relying on *Meyer*, *Pierce*, *Skinner*, *Griswold*, and *Roe* to invalidate a zoning law that interfered with a grandmother's choice to live with her grandson); *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-40 (1974) (relying on *Meyer*, *Pierce*, *Skinner*, *Griswold*, *Baird*, and *Roe* to invalidate an employment restriction operating against pregnant women and thus burdening the woman's decision to bear a child).

due process of law.'" GB 25. In this majestic command the Government sees no "apparent textual meaning" beyond a prohibition against "government's actually taking hold of a person, as to confine him, without fair procedures." *Id.* That criminal prohibitions upon abortion "actually take hold of" a woman's person — her body, her life — and, in the most literal sense, confine her "liberty," cannot be doubted. And that "due process of law" requires more than "fair procedures" whenever the state acts to confine a person's basic liberty was accepted even by the Justices who dissented in *Roe* v. *Wade*[14] — and indeed has been accepted by the entire Court ever since the late 19th century.

13. So too, the fact that "state laws condemning or limiting abortion were very general at the time the Fourteenth Amendment was adopted," GB 25, even excusing the exaggeration,[15] would no more immunize such laws from Fourteenth Amendment scrutiny than the general acceptance of state laws segregating the races in public schools or in marital relations at the time of the Fourteenth Amendment's adoption immunized *those* laws from such scrutiny. *See Brown* v. *Bd. of Educ.*, (*Brown I*), 347 U.S. 483 (1954); *Loving* v. *Virginia*, 388 U.S. 1 (1967).[16]

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[14] *See, e.g., Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting but agreeing that the "due process clause . . . undoubtedly does place" substantive limits on "legislative power" to ban abortions); *Griswold* v. *Connecticut*, 381 U.S. 479, 502 (1965) (White, J., concurring in the judgment).

[15] *See Roe*, 410 U.S. at 138-39.

[16] *See also City of Cleburne, Tex.* v. *Cleburne Living Center*, 105 S.Ct. 3249, 3268-69 (1985) (Marshall, Brennan and Blackmun, JJ., concurring in part and dissenting in part): "Courts . . . do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. Compare

14. Nor is there any substance to the Government's argument that the very lines this Court has drawn in the course of elaborating the basic right upheld in *Roe* v. *Wade* somehow demonstrate that the issues posed are unfit for judicial determination. *See* GB 20-23. Once it is agreed, for example, that a law prohibiting "abortion even where the mother's life is in jeopardy" would violate the Fourteenth Amendment, *see Roe* v. *Wade*, 410 U.S. at 173 (Rehnquist, J., dissenting), this Court can find no escape from drawing complex lines between permissible and impermissible abortion prohibitions. Differences will remain over *where* this Court should draw those lines, but the only way to extricate the Court from the entire line-drawing enterprise is to hold that federal courts must accept as conclusive any legislature's determination that any given restriction of abortions serves legitimate purposes that warrant the resulting intrusion upon liberty. Whether or not, as the Government asserts, those who wrote and ratified the Fourteenth Amendment "would have been surprised . . . to learn that they had put any part of such subjects beyond the pale of state legislative regulation," GB 26 — a position never taken by this Court — surely the Amendment's authors would have been shocked to learn that they had put any major sphere of human liberty beyond the pale of federal judicial protection.

15. The Government's most telling point with regard to the line-drawing *Roe* has required seems to be that such notions as fetal "viability" reflect considerations of a medical or technical sort more suitably addressed by legislatures than by courts, particularly since "[t]here is no obvious constitutional connection between the ability of a fetus to survive outside the

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Plessy v. *Ferguson*, 163 U.S. 537 (1896), and *Bradwell* v. *Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) with *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954) and *Reed* v. *Reed*, 404 U.S. 71 (1971). Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests. . . ."

womb, and the magnitude of a state's lawful concern to protect future life." GB 22. But that misses the entire point of what this Court held in *Roe* v. *Wade*: there *is* an obvious constitutional connection between the ability of a fetus to survive outside the womb and the nature of a woman's right to decide whether to bear a child. For it is *only* with respect to a fetus that is not yet viable that a ban on abortion compels a woman to dedicate her body and future to the survival of the unborn. And the fact that "viability" is a moveable point that "changes with advancing technology," GB 23, far from making the Court's standard "unworkable" or "disturbing," *id.*, has long helped to justify *Roe* v. *Wade's* trimesterization against the charge that it represented an arbitrary exercise in judicial line drawing. Thus, it has been clear since the time *Roe* was decided that, to the extent society as a whole becomes willing to invest sufficient resources in the protection of the unborn and newly born — a willingness likely to be reflected by the advancing line of viability — *Roe* might permit greater state protection of the fetus to follow. Seen in this light, *Roe* has from the outset reflected not so much an absolute rejection of the sanctity of "life" from the moment of conception as a structuring of how a value choice on that subject may be made consistent with constitutional principles. Society's claim of a constitutionally dominant interest in fetal life is made commensurate with society's genuine and general exertion to further that interest — not with its willingness to give the interest token recognition by legislatively condemning women to bear unwanted children or to abort under hazardous and illegal conditions.[17]

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[17] *See* Tribe, "Structural Due Process," 10 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 269, 297 (1975). More generally, in defining "limits [that] leave the individual a significant private sphere to live his life," the standards one evolves, rather than being "fixed and neutral," might *have* to draw on "the changing political and economic arrangements of the subject society. . ." Fried, "Is Liberty Possible?" *III The Tanner Lectures on Human Values* 100, 109 (1982). As Professor Fried correctly noted in 1982, "it is a serious mistake to be disturbed by this." *Id.* at 109.

Conclusion.

In dramatizing its plea that *Roe* v. *Wade* be buried by this Court, the Government exhumes the ghost of *Lochner* v. *New York*, 198 U.S. 45 (1905), *see* GB 29, but nowhere explains why it deems the right to decide whether to bear and beget a child to be indistinguishable from the right to hire another for a substandard wage. In citing Justice Holmes' aphorism in *Lochner* that the Constitution is "made for people of fundamentally differing views," and that "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion," 198 U.S. at 76 (dissenting opinion), the Government conveniently omits Justice Holmes' closing caveat: "unless . . . the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Id.* Statutes unduly restricting a woman's ability to decide whether or not to bear a child do infringe precisely such "fundamental principles." Accordingly, *Roe* v. *Wade* — a decision entirely faithful to that tradition — should be followed in the cases currently pending before this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, et al.,
Appellants,

—vs.—

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, et al.,
Appellees.

EUGENE F. DIAMOND, et al.,
Appellants,

—vs.—

ALLAN G. CHARLES, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF FOR THE UNITARIAN UNIVERSALIST ASSOCIATION, AND TWENTY-TWO OTHER RELIGIOUS ORGANIZATIONS, AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES

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INTEREST OF AMICI

This brief amici curiae is filed in support of appellees in both cases before the Court, by the following religious organizations: THE AMERICAN ETHICAL UNION; AMERICANS FOR RELIGIOUS LIBERTY; AMERICAN HUMANIST ASSOCIATION; BOARD FOR HOMELAND MINISTRIES, UNITED CHURCH OF CHRIST; B'NAI BRITH WOMEN; CATHOLIC WOMEN FOR REPRODUCTIVE RIGHTS; CATHOLICS FOR A FREE CHOICE; COORDINATING CENTER FOR WOMEN, UNITED CHURCH OF CHRIST; EPISCOPAL WOMEN'S CAUCUS; NATIONAL BOARD, YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A.; NATIONAL COALITION OF AMERICAN NUNS; NATIONAL COUNCIL OF JEWISH WOMEN; NATIONAL FEDERATION OF TEMPLE SISTERHOODS; NATIONAL SERVICE CONFERENCE, AMERICAN ETHICAL UNION; OFFICE FOR CHURCH IN SOCIETY, UNITED CHURCH OF CHRIST; PIONEER WOMEN/NA'AMAT; PRESBYTERIAN CHURCH (U.S.A.); UNION OF AMERICAN HEBREW CONGREGATIONS; UNITARIAN

UNIVERSALIST ASSOCIATION; UNITARIAN UNIVERSALIST WOMEN'S FEDERATION; UNITED CHURCH OF CHRIST; UNITED SYNAGOGUE OF AMERICA; WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM.

The organizations joining this brief are or include representatives of Protestant, Catholic, Jewish and other faiths, reflecting a broad spectrum of religious believers in this country. These organizations are committed to principles of religious liberty; they also reflect a broad spectrum of beliefs about the morality of abortion.[1] Among the amici are denominations which adhere to

1. The positions of the Religious Coalition for Abortion Rights, of Americans for Religious Liberty, and of 36 national religious organizations which favor the right to choose abortion among which are the amici curiae, are contained in the Appendices A, B and C respectively at A-1, A-3, and A-4.

religious principles that permit, counsel, and even mandate abortion under certain circumstances. Others strongly discourage it under many circumstances. But all believe that the abortion decision is a deeply religious and personal one of ultimate dimension which must be relegated to the conscience of the individual woman free of governmental interference or coercion. They believe further that the effort to restrict abortion is generally rooted in an opposing theological position concerning the creation of human life and the beginning of human personhood; and that, in the face of religiously-based moral differences, government in a free society is without power to take sides.

It is the position of amici that the freedom of belief guaranteed by the First Amendment and principles of religious liberty require invalidation of this legislation

which has no purpose and effect other than to encroach upon and ultimately deny the right that is the cornerstone of our Constitution--the right of conscience.

With the consent of the parties indicated in letters being lodged with the Clerk, amici respectfully submit this brief to advance their position to this Court.

QUESTIONS PRESENTED

1. Whether First Amendment principles of freedom of conscience and religious liberty require adherence to Roe v. Wade and the invalidation of abortion restrictions designed to sponsor and impose a particular belief regarding the morality of abortion.

2. Whether the standard of strict scrutiny applied in Roe v. Wade and Akron v. Akron Center for Reproductive Health must be applied here to fulfill this Court's duty under Article III and the Bill of Rights to guard fundamental rights against legislative infringement.

SUMMARY OF ARGUMENT

Since Roe v. Wade, the nature and scope of individual constitutional rights at stake in the abortion context have never been questioned more explicitly or pointedly than in these cases.

The United States Department of Justice has submitted an amicus brief in which it urges the Court to repudiate the Roe v. Wade decision. The Solicitor General asserts that the Court should retract its acknowledgement, in Roe v. Wade, of the constitutional status of individual freedoms implicated in the abortion decision, or at least dilute its standard of review and defer to the legislature with respect to a fundamental right in controversy. This contention advocates a shocking and dangerous departure from the principle which is the cornerstone of our constitutional scheme, that it is the "province and duty of the judicial department

to say what the law is," Marbury v. Madison, 5 U.S. (1 Cranch), 137, 176 (1803), and to protect the rights of the individual against majoritarian disapproval and excess.

In defense of the challenged statutes, the Solicitor General contests the constitutional command at the heart of Roe v. Wade--that civil government must remain ideologically neutral with respect to the inseparable questions of the "morality" of abortion and "when life begins." The Solicitor General's argument highlights, just as the particular statutes before the Court illustrate, the impermissibility of abortion restrictions under the First Amendment. It also underscores that the decision in Roe v. Wade, which denied to civil authority the power to adopt a "theory of life," was compelled not only by the Fourteenth but also by the First Amendment.

The First Amendment's shelter for the

realm of intellect and spirit denies to the state the power to require individuals to espouse or to listen to beliefs they do not hold. The First Amendment likewise protects against being induced or forced to act according to morally offensive beliefs. By requiring espousal of, and seeking to induce conformity to, the belief that human life begins at conception, the statutes violate the First Amendment.

Moreover, because the controversy over abortion involves competing moral viewpoints rooted, for the most part, in theological differences, statutes, such as those at issue here, which fall outside the ambit of neutral, judgment-free abortion regulations delineated in Roe v. Wade, violate the First Amendment guarantee of religious liberty.

These statutes interfere ideologically and practically with a woman's right to freely exercise her religion and conscience

in making the abortion decision, while placing no similar obstacles in the path of the woman whose faith compels childbirth. Views regarding the "morality" of abortion and the correlative question of whether human life begins at conception stem from deeply-held conscientious principles which intrinsically are, or represent the functional equivalent of, theological beliefs. State-sponsorship of any one viewpoint departs from the rigorous governmental neutrality required where competing religious and conscientious claims are at stake.

ARGUMENT

I. ADHERENCE TO ROE V. WADE IS NECESSARY TO PRESERVE FIRST AMENDMENT PRINCIPLES OF FREEDOM OF CONSCIENCE AND RELIGIOUS LIBERTY.

At the heart of the statutes at issue are several provisions which evidence an underlying purpose to advance the theory that actual life begins at conception, or at some point prior to birth. These provisions underscore the unconstitutionality of the remaining sections invalidated by the courts below, which advance this theory by impermissibly placing a higher value on the fetus than on the needs of the pregnant woman. They also bring into sharp focus the First Amendment underpinnings of this Court's refusal to allow civil government to adopt "a theory of life" to override a woman's right to abortion. Akron v. Akron Center for Reproductive Rights, 462 U.S. 416, 444 (1983); Roe v. Wade, 410 U.S. 113, 162 (1973).

The premises and purposes of the 1982 Pennsylvania Abortion Control Act (18 Pa. Cons. Stat. Ann. §§3201-3220) (Purdon 1983) are set forth in unequivocal terms at the outset. It is based on a legislative intent to "to protect the life and health of the child subject to abortion," and the conclusion that because "the Commonwealth places a supreme value upon protecting human life," it is necessary to impose upon physicians "precise standards of care where their actions do or may result in the death of an unborn child" (emphases added). §3202.

The Pennsylvania Act requires the doctor to tell a woman seeking abortion "that there may be detrimental physical and psychological effects [of abortion] which are not accurately foreseeable," §3205(a)(1)(iii) and the gestational age of the "unborn child" at the time the abortion is to be performed. §3205(a)(1)(iv). The doctor is required to

advise her of the possible availability of medical assistance benefits for "prenatal care, childbirth and neonatal care," §3205(a)(2)(i), and "[t]he fact that the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion." §3205(a)(2)(ii). The doctor must also refer the woman to certain materials published by the state which contain, among other things, information regarding agencies and services available to assist her with pregnancy, childbirth and adoption, a statement that "[t]he Commonwealth of Pennsylvania strongly urges you to contact [these agencies] before making a final decision about abortion," and information regarding "the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full-term, including any relevant information on the

possibility of the unborn child's survival." §3205(a)(2)(iii), §3208.

Finally, the Pennsylvania Act requires the doctor, in performing post-viability abortions, to utilize the method of abortion most likely to result in a live birth unless the procedure would create a "significantly greater medical risk" to the woman. §3210(b). As the Third Circuit found, this section requires "the woman to bear an increased medical risk in order to save her viable fetus...," and requires the doctor "to make a 'trade-off' between the woman's health and fetal survival." American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 300 (3rd Cir. 1984). At the same time, the statute eliminates certain mental health concerns from the consideration of whether a woman's health is jeopardized by choosing a method of

abortion designed to save the fetus.[2]

The Illinois Abortion Law similarly contains provisions which reflect the state's purpose of advancing the theory that life begins at conception. For example, section 11(d) requires doctors under all circumstances to inform women of the fact that a prescribed drug, such as a form of birth control, acts as an "abortifacient," which is defined in section 2(10) as any substance or device known to cause "fetal death." Ill. Rev. Stat. Ch. 38, ¶¶81-22(10), 81-31(d)(1983). In carrying out the state's theory of the primacy of prenatal life over women's well-being, another provision requires doctors to observe the same standard of care in aborting a "possibly viable" fetus as would be required when attempting to bring

2. Section 3210(b) provides, in part, that "[t]he potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother."

a truly viable fetus to live births §6(4). Ill. Rev. Stat. Ch. 38, ¶81-26(4) (1983).

The portions of the Pennsylvania and Illinois statutes which propagandize the belief in the primacy of the fetus and the immorality of abortion, and which require individuals to express, listen to and act in accordance with that view, illuminate the meaning and wisdom of the decision in Roe v. Wade, 410 U.S. 113 (1973).

A. The Framework Established in Roe v. Wade Enforces The First Amendment Prohibition of State Sponsorship of Belief in Derogation of Individual Freedom of Conscience.

In Roe v. Wade, this Court emphasized the theological and metaphysical nature of the underlying question of when life begins:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in

> a position to speculate as to the answer.

410 U.S. at 159. The absolute refusal to allow the state to "adopt a theory of life" to override a woman's right to abortion, or to regard its interest in potential life as overriding its interest in the well-being of pregnant women, was an affirmation of the individual's freedom to believe and to follow one's beliefs as well as of the absence of power in the state to sponsor a contrary civil or religious faith.

The Court in Roe v. Wade outlined the full extent to which legitimate state concerns justify government regulation of abortion. That decision correctly isolated the only neutral, judgment-free bases of regulation. It recognized that, under our secular system of government, the state's obligation to respect and preserve the life and health of women will, under all

circumstances, outweigh any interest the state has in the potentiality of life presented by the fetus. The Court precluded the state from altering this constitutionally-based hierarchy of governmental priorities. Conversely, it required civil government to follow a hands-off approach with respect to the value-laden issues of the morality of abortion and the question of "when life begins," and relegated such issues to the conscience of the individual.

The question of whether abortion is right or wrong for a particular woman under particular circumstances is a matter which involves competing claims based on divergent moral beliefs as to which the First Amendment's guarantee of freedom of conscience prohibits the state from taking sides. Virulent public debate over the correct set of absolute principles defining

the value to be ascribed to prenatal life and the circumstances under which abortion is right or wrong does not in any way suggest that the individual's conscientious decision deserves a lesser degree of constitutional protection. To the contrary, the controversy confirms the value and propriety of affording that very form of protection. As the Court recognized in West Virginia State Board of Education v. Barnette:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time have been waged by many good as well as evil men...Those who begin the coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of the opinion achieves only the unanimity of the graveyard.
>
> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there

> is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.

319 U.S. 624, 641-42 (1943), quoted in Wallace v. Jaffree, __ U.S. __, 86 L.Ed. 2d 29, 41 n.39 (1985).

As the statutes before the Court in these cases demonstrate, the effort to control abortion is part of a new "struggle to coerce uniformity" and dictate the bounds of permissible thought, belief, expression and action. Both the Pennsylvania and Illinois statutes contain provisions purporting to insure "informed consent," yet which require the doctor to give, and the woman to hear, particular information which supports, in blatant and subtle ways, the underlying legislative contention that abortion is immoral.

While a doctor cannot complain of being required to give the objective information necessary to ensure informed consent, Akron v. Akron Center for Reproductive Health, 462 U.S. at 442-444, Planned Parenthood v. Danforth, 428 U.S. 52, 68 (1976), this ordinance converts the legitimate process of informed consent into both a "straight-jacket"[3] and a propaganda tool for the position that abortion is immoral. As such, it violates not only the right to decide free of state interference, but also the First Amendment right not to be coerced to speak or listen.

It is axiomatic that the state cannot, consistent with the First Amendment, use its citizens to propagandize certain beliefs. As the Court recently noted, "the right to speak and the right to refrain from speaking are

3. Planned Parenthood v. Danforth, 428 U.S. at 68 n. 8.

complementary components of a broader concept of freedom of mind...." Wallace v. Jaffree, 86 L.Ed. 2d at 40. Similarly, in Wooley v. Maynard, the Court held that freedom of thought protects the right of individuals not to bear an ideological message which they find "morally objectionable." 430 U.S. 705, 715 (1977). See also, Elrod v. Burns, 427 U.S. 347 (1976) (Public employment cannot generally be conditioned on affiliation with a particular political party). This form of governmental compulsion "transcends constitutional limitations on [government's] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." West Virginia State Board of Education v. Barnette, 319 U.S. at 642.

Moreover, certain sections require the doctor to communicate or refer the patient to

information he or she does not believe to be truthful, let alone objective in nature. While there is no case on point in the annals of this Court, the freedom of thought and expression shielded by the First Amendment must surely extend protection against state-enforced compulsion to lie or mislead. See Torasco v. Watkins, 367 U.S. 488, 494 (1961) (First Amendment prohibits limiting public office to those who have or profess belief in certain religious concepts).

The First Amendment rights of pregnant women are also violated by this mandated consent process. Just as the First Amendment guarantees a right to listen and receive information, see e.g., Stanley v. Georgia, 394 U.S. 557, 564 (1964) (right to read obscenity in one's house); it also guarantees its counterpart--the right not to be forced to listen. Cf. Wallace v. Jaffree, 86 L.Ed. 2d at 40 (First Amendment protects certain

conduct and guarantees the corollary rights to refrain from those activities as part of a "broader concept of individual freedom of mind"); Griswold v. Connecticut, 381 U.S. 479, 482-84 (1965) (penumbras of First Amendment include many rights not specifically articulated).

The Constitution has been held to intervene to protect against forced listening where the invasion of privacy and the captivity of the audience is far less severe than it is under statutes regulating the doctor-patient relationship. See e.g. Federal Communications Commission v. Pacifica, 438 U.S. 726 (1978) (regulation of "offensive" material on radio); Kovacs v. Cooper, 336 U.S. 77 (1949) (ordinance regulating sound trucks). Making the doctor a mouthpiece of the state, the sanctity of a woman's decision-making process is invaded. Unlike the radio listener who can decide not

to listen to a particular channel, the pregnant woman cannot refuse the information or affect the doctor's obligation to give it to her unless she sacrifices her right to abortion.

There is little more offensive to the notion of a free people than compulsion to speak or to hear morally objectionable and one-sided messages, or efforts by the state to enforce uniformity of belief. Despite the efforts of those opposed to abortion to create the appearance of a resolution of the deep underlying conflict over the value to be ascribed to prenatal life, it is clear that the conflict rages unabated.[4] It remains an

4. See, The Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. (1981), The Human Life Bill-Appendix: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., and (fn. cont. on next page).

irresoluble conflict between different conceptions of the meaning and sanctity of life, rooted in differing religious, moral, ethical teachings. The principle enunciated by this Court in Roe v. Wade--that the state may adopt no "theory of life" either to coerce or induce conformity--is the only one consistent with the First Amendment and the preservation of the pluralistic society which it envisioned.

B. Roe v. Wade Advances the Policies of Voluntarism and State Neutrality in Matters of Religion Embedded in the Religious Liberty Guarantees.

The statutes at issue here reflect the type of double-barrelled violation of the First Amendment which Roe v. Wade is designed effectively to avoid. Not only do they

(fn. cont. from preceding page)
The Human Life Bill-S. 158: Report, together with Additional and Minority Views to the Committee on the Judiciary made by its Subcommittee on Separation of Powers, 97th Cong., 1st Sess.

invade the realm of individual conscience by professing a "theory of life" intended to induce women to forgo abortion, they also advance a "theory of life" which is inconsistent with religious and conscientious decisions themselves protected by the religious liberty clauses. By tacitly encouraging adherence to a particular belief, the statutes offend both the principle of voluntarism and the mandate of governmental neutrality embodied in the Free Exercise and Establishment Clauses.

1. The Challenged Statutes Demonstrate that Roe v. Wade is Necessary to Avoid Infringement of the Individual Right to Make and Effectuate a Conscientious Decision on Abortion Protected by the Religious Liberty Clauses.

Abortion ranks as a paramount concern in all major religious traditions. For those of the anti-abortion faiths, actual human life begins at or near conception and abortion is

a grave sin, which destroys God's creation and is analagous to murder. Conversely, in the pro-choice faiths, the preservation of the health and well-being of existing life, and consideration of the responsibilities of parenthood outweigh the interest in potential life and rank among the highest obligations of human beings towards one another and toward God.

The Free Exercise Clause protects the right to believe or disbelieve. Torasco v. Watkins, 367 U.S. 488 (1961). It protects the right to practice one's beliefs, and to act in accordance with them. McDaniel v. Paty, 435 U.S. 618 (1978). It encompasses decisions about daily life which are "rooted in religious belief" rather than personal preference. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

The religious liberty guarantee also shields the exercise of conscience:

decisions that reflect "religious choice" even though not compelled by religious dogma, Thomas v. Review Bd., 450 U.S. 707, 715-716 (1981), and decisions which are based on a "belief that occupies in the life of its possessor a place parallel to that filled by the orthodox belief in God." United States v. Seeger, 380 U.S. 163, 176 (1965).[5] The

5. Though Seeger involved statutory interpretation of the conscientious objector exemption rather than a constitutional holding, the expansive interpretation was influenced by the concern for avoiding preferential treatment of the traditional believer as compared to the non-traditional one. United States v. Seeger, 380 U.S. at 176; Welsh v. United States, 398 U.S. 333 (1970) (Harlan, J., concurring). In Gillette v. United States, 401 U.S. 437 (1971), the selective objector claim, found to be outside the statutory exemption, nonetheless triggered scrutiny under both the Free Exercise and Establishment Clauses.

— Court recently restated this longstanding principle in Wallace v. Jaffree:

> the individual's freedom to choose his [her] own creed is the counterpart of his [her] right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience,

> but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful (footnotes omitted).

86 L.Ed. 2d at 40-41. See also Thornton v. Caldor, ___U.S.___, 86 L. Ed. 2d 557, 564 (1985) (O'Connor, Marshall, J.J., concurring) (invalidating a statute protecting Sabbath observers "without according similar accommodation to ethical and religious beliefs and practices of other private employees.")

Rooted in a policy of voluntarism in matters of religion and conscience, the Free Exercise Clause protects against direct and indirect schemes to discourage religious exercise. A state invades the realm of freedom of religion if it purposefully, or

even inadvertently, conditions benefits or exacts a toll that puts "substantial pressure on an adherent to modify his [her] behavior and to violate his [her] belief." Thomas v. Review Board, 450 U.S. at 718; Sherbert v. Verner, 374 U.S. 398, 404-07 (1963). Therefore, content-based, judgmental legislative intervention impinging on the religious and conscientious abortion decision-making process violates the policy of voluntariness underlying the religious liberty guarantees, as well as the right to privacy.

By requiring doctors to give out, and women to hear, information reflecting a theory of life that renders abortion immoral clearly invades the shield afforded by the Free Exercise Clause to the integrity of differing religious and conscientious

beliefs. The information required to be provided under the challenged statutes is designed to advance the view that the fetus is a person from the moment of conception and cause the woman to question her own beliefs and reconsider her decision to have an abortion or to utilize a particular form of birth control.[6] Other constraints on the informed consent process, such as the giving of false, misleading, erroneous and distorted information as to risks and benefits, or the availability of adoption or other

6. The fact that the materials prepared by the State of Pennsylvania might be supplemented or contested in the hands of a particular doctor does not eliminate their coercive element; nor does it obviate the "substantial risk" that the materials will be used as a tool of "state-sponsored indoctrination" in the hands of another doctor. Grand Rapids School District v. Ball, __U.S.__, 87 L.Ed. 2d 267, 279 (1985). "Such indoctrination, if permitted to occur, would have devastating effects on the right of each individual to determine what to believe (and what not to believe) free of any coercive pressures from the State." Id. at 278. Cf. Levitt v. Committee for Public

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services--are designed to induce a woman to renounce abortion or, at the least, to impugn her decision-making process.

The informational requirement regarding "abortifacients" contained in the Illinois statute constitutes a particularly offensive type of moralistic preaching in violation of the constitutional guarantee of religious liberty. In the absence of secular, much less compelling, justification, it intrudes on the decision-making process, and burdens access to the means to effectuate a procreational decision regarding birth control and abortion, in a way which goes

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Education, 413 U.S. 472, 480 (1973)("[T]he State is constitutionally compelled to assure that the state-sponsored activity is not being used for religious indoctriniation"); Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)("The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion").

beyond infringing the Free Exercise right to put one's religious and conscientious choices into practice. For example, its impact upon a woman whose religious teachings oppose abortion but who, after considerable soul-searching, has arrived at an individual, conscientious decision to choose an early abortion, or to use a curative drug or a particular form of birth control, poses a unique offense to the Free Exercise Clause. The freedom to follow the dictates of one's conscience in deciding not to follow the dogmatic teachings of one's faith, and to do so without feelings of shame or guilt inflicted by the state, is the complementary component of the constitutional guarantee of free exercise. See Thomas v. Review Board, 450 U.S. at 715-716 ("the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."); Wallace v. Jaffree, 86 L. Ed. 2d at

40.

The Illinois requirement regarding "abortifacients" also demonstrates the way in which women are invidiously affected by restrictions aimed at promoting a particular "theory of life" which restrict the doctor's freedom of conscience regarding matters of ethics and medicine. A woman is entitled to rely on the doctor to provide her with information she requests, and to decide, on the basis of his or her best medical judgment and in light of his or her intimate knowledge of the physical and emotional needs and beliefs of the patient, what other information can or should be disclosed.

The "method of choice" provision of the Pennsylvania statute presents an even greater affront to the constitutionally-mandated respect for the freedom of conscience of both the doctor and the patient. The woman's conscientious decision to have an abortion

is, for all practical purposes, overriden. Not only is she forced to bear a "medical risk" to preserve the fetus, but extreme mental anguish she may suffer over the prospect of a "live birth"--which may itself have served as the basis for her religious and medical decision to abort--is not considered.[7] Moreover, requiring a doctor to knowingly inflict upon his or her patient an increased health risk to preserve the fetus will undoubtedly trample the religious and conscientious, as well as the medical, convictions of countless doctors.

This lack of respect for the conscientious beliefs of doctors concerned

7. This provision thus comes into direct conflict with what is often a medically and religiously mandated decision. For example, Jewish law is interpreted by many to include the pregnant woman's extreme mental anguish (regardless of its specific source) carrying with it suicidal tendencies within the category of life-threatening situations in which abortion is required. Feldman, Marital Relations, Birth Control and Jewish Law 284-286 (1974).

with the well-being of their female patients is in sharp contrast with the Pennsylvania statute's treatment of doctors whose personal beliefs coincide with those of the state. Indeed, the discrimination accomplished by the statute is not at all inadvertent; it is explicit in the statutory scheme. Doctors who are opposed to abortion are protected against being required to participate in abortion under the statute itself.[8] By contrast to this respect for conscientious convictions of those opposed to abortion, the statutes require pro-choice doctors to participate in informed consent processes and

8. Section 3202(d) of the Pennsylvania statute provides:

Right of conscience--It is the further public policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other

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medical practices which violate their conscientious beliefs as well as their ethical and professional commitments.

2. The Challenged Statutes Demonstrate That Roe v. Wade is Necessary to Enforce the Obligation of State Neutrality Commanded by the Religious Clauses.

As Roe v. Wade recognized, statutes which burden women and their doctors in rendering and effectuating the abortion decision as a matter of conscience, violate the obligation of state neutrality on matters of conscience and religion. These cases once again invoke the "constitutionally imposed 'governmental obligation of neutrality' originating in the establishment and free

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persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, subsidize, accept or provide abortions.

exercise clauses of the First Amendment." Maher v. Roe, 432 U.S. 464, 474, n. 8 (1977), quoting Sherbert v. Verner, 374 U.S. at 409.

Neutrality as between differing religious and non-religious views and practices is a core principle of the First Amendment. It has long been settled that "a state can[not], consistent with the First Amendment, pass laws which...prefer one religion over another," Everson v. Board of Education, 330 U.S. 1, 15 (1947), and that a proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion." Committee for Public Education v. Nyquist, 413 U.S. 756, 792-793 (1973), quoted in Wallace v. Jaffree, 86 L. Ed. 2d at 46 n.50.

The requirement of neutrality is strict where the free exercise of religion is at

issue. See Walz v. Tax Commission, 397 U.S. 664 (1970). The Free Exercise Clause "prohibits misuse of secular governmental programs 'to impede the observance of one or more religions or to discriminate invidiously between religions...even though the burden may be characterized as being only indirect.' Braunfeld v. Brown, 366 U.S. 599 (1961) at 607." Gillette v. United States, 401 U.S. at 462. Thus Sherbert not only held that the absolute Saturday work requirement for unemployment compensation eligibility was an impermissible burden on free exercise of a sabbatarian; it also held that the "unconstitutionality of the disqualification of the Sabbatarian...[is] compounded by...religious discrimination" in that, by contrast to the treatment of the sabbatarian, the emergency labor laws exempted those who were "conscientiously opposed to Sunday work." 374 U.S. at 406.

When recently confronted with the question at issue in Sherbert from the opposite constitutional perspective, the Court reiterated the importance of state neutrality in light of the guarantee of religious liberty. In Thornton v. Caldor, Inc., the Court invalidated a statute which granted Sabbath observers an absolute right to a day off in part because it gave no rights or consideration to "[o]ther employees who have strong and legitimate, but nonreligious reasons for wanting a weekend day off." Thornton v. Caldor, Inc., ___U.S.___, 86 L. Ed. 2d 557, 563 n. 9 (1985). As the concurring Justices noted, the statute improperly granted special protection for Sabbath observers, "without according similar accommodation to ethical and religious beliefs and practices of other private employees," thereby conveying a message "of the endorsement of a particular

belief, to the detriment of those who do not share it." Id. at 564 (O'Connor, and Marshall J. J., concurring).

The overall discriminatory character of the statutes at issue is clear. Women who, out of religious or conscientious conviction, determine that abortion or a particular drug or form of birth control, is proper, are subjected to a program of discouragement and deterrence, while women who for similar reasons are compelled to or opt to bear a child suffer no such hindrance in the effectuation of their religious choice. Those who choose abortion are being burdened, not to advance their health or some independent, secular, and neutral purpose, but for the purpose of inducing them to consider and obey the belief that life begins at conception and abortion is immoral.

Equal treatment of both the woman whose conscience dictates abortion rather than

childbirth and the doctor who assists her requires that these one-sided statutes be invalidated. See also United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970). The lack of compelling let alone colorable interest for these statutes is thus highlighted by the religious discrimination it effects.

Far from advancing maternal health or an objectively informed decision, the goal of the statutes is to convert, or at least shame, women whose conscience dictates abortion, or the use of an "abortifacient," contary to the states' moral and religious positions that abortion is the taking of human life.

This Court has repeatedly held in First Amendment cases that mere disagreement with the content of belief or protected action does not suffice to justify infringement. See e.g., Fowler v. Rhode Island, 345 U.S.

67, 69-70 (1953); Niemotko v. Maryland, 340 U.S. 268, 272-73 (1951); Ballard v. United States, 322 U.S. 78 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943); Only where the free exercise of religion would pose a "substantial threat to public safety, peace and order," Sherbert v. Verner, 374 U.S. at 403, can the state counterpose its moral view against that of the believer. See e.g., Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905).

If this were not so, then the protection afforded by the religious liberty guarantee of the Constitution would be swallowed up by the moral disapproval that particular beliefs and practices often inspire. Since the women burdened by these statutes seek to obtain a perfectly legal service, the moral position adopted by the states cannot itself satisfy the compelling interest test, let alone

qualify as legitimate in this context.

Moreover, the fact that the state legislatures have taken a position that deprecates a moral decision sacred to dissenting faiths threatens the dangers of intolerance, oppression and sectarian strife that the Religion Clauses were designed to avert. Wallace v. Jaffree, ___U.S.___, 86 L. Ed. 2d 29 (1985); Everson v. Board of Education, 330 U.S. 1, 15-16, 53-55 (Rutledge, J. dissenting). Where as here, an issue is perceived as religious by many, and particularly by dissenting faiths, state sponsorship sacrifices the neutrality necessary to the preservation of religious harmony and the public peace. People ex rel. McCollum, 333 U.S. 203, 228 n. 19 (1948); cf. Grand Rapids School District v. Ball, 87 L. Ed. 2d at 276, 281. James Madison remonstrated that against any state support for religious belief, even purportedly even-handed support:

> Because, it will destroy that moderation and harmony which the forebearance of our laws to intermeddle with Religion, has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempt of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions...If...we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken of the first fruit of the threatened innovation.

"Memorial and Remonstrance," reprinted in Everson v. Board of Education, 330 U.S. at 69 (Appendix to Rutledge, J. dissenting).

Madison's warning sounds far too contemporary. The effort reflected in the statutes before this Court to advance the belief that life begins at conception, to stop, disparage and discourage abortion and to elevate concern for prenatal life over concern for the rights and needs of pregnant women is part of a program pressed by a new and dangerous religious movement to undo the

separation of church and state guaranteed by the First Amendment. The decision in Roe v. Wade exemplifies the fact that this Court is the ultimate refuge for the freedom of conscience that the principles of religious liberty preserve.

II. THIS COURT IS DUTY-BOUND TO GIVE STRICT SCRUTINY TO STATUTES THAT IMPINGE THE EXERCISE OF FUNDAMENTAL RIGHTS.

The Solicitor General of the United States has filed a brief in these cases which suggests a radical and dangerous departure from our constitutional scheme. The Solicitor's argument that the Court should altogether reverse the constitutional holding of Roe v. Wade or, at a minimum, dilute the constitutional standard for reviewing restrictions on abortion, are both based on his contention that legislatures on every level, and not the Court, should determine what rights are fundamental and the extent to which they will be protected. Essentially, the Solicitor is calling for this Court to abdicate its constitutional function as guardian of individual and civil rights.

Similar arguments have been heard in this Nation during periods when

constitutional rights were under attack. One of the most eloquent responses to the argument for legislative deference was made by Justice Jackson, in a case which is, at its heart, very similar to this one:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

West Virginia State Board of Education v. Barnette, 319 U.S. at 638.

To the argument that the Court lacked competence to protect fundamental rights in the face of competing policy considerations, he replied:

> ...[W]e act in these matters not by authority of our competence but by force of our commissions. We cannot because of our modest

> estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Id. at 639-40.

The contention that the Court should defer to the legislatures on a matter of fundamental rights threatens every guarantee of the Bill of Rights. All constitutional rights, whether explicit or implicit, are necessarily defined and shaped by this Court's interpretation of constitutional principle. This includes rights so fundamental as the right to be free of racial segregation, Brown v. Board of Education, 347 U.S. 483 (1954), or of state sponsorship of religious exercises in the schools, Wallace v. Jaffree, 86 L. Ed. 2d 29 (1985); Engel v. Vitale, 370 U.S. 421 (1962). With each one of these decisions and with countless others the Court has faced and survived powerful

pressures from political movements opposed to the Constitution's guarantee of these fundamental rights.[9]

The right to privacy which embraces the right to abortion is not, as the Solicitor suggests less deserving of this Court's rigorous protection because it is implicit in the Bill of Rights. It is, in fact, the foundation of human capacity to exercise all the rights guaranteed in a democracy. As Justice Brandeis wrote:

> The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a

9. For example, in response to Brown v. Board of Education, its opponents sought to withdraw Supreme Court and lower federal court jurisdiction from school desegregation cases. See, e.g. H.R. 1228, 85th Cong., 1st Sess. (1957), and S. 3467, 85th Cong., 2d Sess. (1958). Likewise, after the decision in Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971), opposition was marshalled in the form of both constitutional (fn. cont. on next page)

> part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized man.

(fn. cont. from preceding page) amendments, see, e.g. H.J. Res. 1035, 92d Cong., 2d Sess. (1972), S.J. Res. 165, 92d Cong., 1st Sess. (1971), H.J. Res. 30, 823, 856, 858, 92d Cong., 1st Sess. (1971); and bills, which received the backing of the Nixon Administration, see H.R. 13915, 13916 92d Cong., 2d Sess. (1972). In the area of school prayer, efforts to circumvent the impact of this Court's decisions in Engel v. Vitale, 370 U.S. 421 (1961) and School District of Abington v. Schemp, 374 U.S. 203 (1963) have included numerous constitutional amendments. See, e.g. the Becker Amendment (1964), the Dirksen amendments (1966, 1967), and the Wylie amendment (H.J. Res. 191, 1971).

Similarly, this Court's decisions in the areas of reapportionment and citizen protection from legislative investigation, have been opposed by legislative attempts to limit the Court's jurisdiction. See Eisenberg, "Congressional Authority to Restrict Lower Federal Court Jurisdiction," 83 Yale Law Journal 498 (1974).

Olmstead v. United States, 277 U.S. 438, 487 (1928) (Brandeis, J., dissenting).

Periodically, this nation and our Constitution are threatened by religious and ideological forces which seek safety in conformity and efficacy through coercion. In such times as these, when legislatures are under extreme pressure to undo the Bill of Rights, the Court, as the ultimate guardian of the liberties fundamental to a democracy, is inevitably under attack as well. But the integrity of the Court, the survival of our constitutional system, and the guarantee of individual liberty are preserved, not by acquiescence to these pressures, but by solemn and unswerving fulfillment of the duty conferred upon this Court by the written Constitution.

In sum, the Solicitor challenges the most fundamental principle of the constitutional scheme of checks and

balances--that it is "the province and duty of the judicial department to say what the law is," to declare that "an act of the legislature, repugnant to the constitution is void," and to guarantee that when rights are violated, the "individual has a right to resort to the laws of his country for a remedy." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 166 (1803). This Court has no higher office under the Constitution than to protect individual rights under challenge.

Under any standard of review under the Fourteenth Amendment, the statutes before the Court in these cases must be invalidated. But the protection of the right to abortion, like that of all fundamental constitutional rights, properly calls for undiluted application of strict judicial scrutiny.

CONCLUSION

The liberty of conscience, guaranteed by the First Amendment's prohibition on state sponsorship or imposition of any belief, let alone religious belief--these are cornerstones of our pluralistic democratic society. The battle raging over abortion is not a battle between good and evil, as some may see it, but is rather a battle between differing conceptions of the good. Each conception is grounded in profound religious, moral and ethical principles, and each is equally incomprehensible and offensive to those who believe otherwise.

This Court's decision in Roe v. Wade charts the only course acceptable under our Constitution--refusing to government the power to adopt a "theory of life," and guaranteeing to women a sphere of untrammeled privacy for the exercise and effectuation of their own, differing conscientious

convictions. Any departure from the principles of Roe v. Wade threatens not only the right to abortion, but the foundation of individual freedom under the Constitution. As James Madison said: "[I]t is proper to take alarm at the first experiment on our liberties..." "Memorial and Remonstrance" in Everson v. Board of Education, 330 U.S. at 65-66 (Appendix to Opinion of Rutledge, J., dissenting).

WHEREFORE, the challenged statutes should be invalidated.

Respectfully submitted,

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APPENDIX

APPENDIX A

RELIGIOUS COALITION FOR ABORTION RIGHTS (1979)

Statement of Purpose: The Religious Coalition for Abortion Rights is an organization of national religious bodies which, on the basis of faith and moral conviction and in the light of constitutional guarantees of privacy and religious freedom, seeks to encourage and coordinate support for safeguarding the legal option of abortion; for ensuring the right of individuals to make decisions concerning abortion in accordance with their consciences and responsible medical practice; and for opposing efforts to deny these right through constitutional amendment, or federal and state legislation.

Rationale: Many religious organizations representing diverse denominations have adopted the position that decisions concerning abortion would be made according

to individual conscience, consistent with responsible medical practice, free from the threat of criminal penalty...

However, a vocal minority would deny the option of legal abortion to all. Their personal belief that human life exists from the moment of conception has prompted their efforts to nullify the Supreme Court decision through a Constitutional amendment which would restrict access to abortion. One theological view would thus become law, binding on Americans of all faiths.

It is vital to increase public awareness of this danger. Enactment of such legislation would violate the religious freedom of every citizen by circumventing the First Amendment guarantee of church-state separation.

APPENDIX B

AMERICANS FOR RELIGIOUS LIBERTY (1982)

Statement of Principles: We believe in the American tradition of religious and intellectual freedom within a secular democratic state. We believe in the philosophy of Thomas Jefferson and James Madison which gave birth to this tradition. We believe in the American Constitution and the Bill of Rights which make it the law of the land.

A free and secular democratic state guarantees religious liberty. It guarantees equal freedom to the religious and the non-religions. It makes religious faith a private matter and gives no special privileges to any religion or idea or practice.

A free and secular democratic state secures personal freedom and privacy. It defends the individual against the tyranny of

transient majorities or determined minorities. It allows all people to follow their own consciences and restrains them only when they harm the public welfare. It makes abortion and sexual behavior between consenting adults issues of personal choice...

APPENDIX C

The following are excerpts from statements about abortion by national religious organizations:

AMERICAN BAPTIST CHURCHES, U.S.A. (General Board, 1981)

Public law, enacted by human reason and enforced by state power, can never fully express the moral sensitivity of Christian love. We are therefore grateful for the Constitutional protection of religious freedom which guarantees our right to make personal moral decisions based on religious

principles.

We recognize that Christian persons of sensitive and informed conscience find themselves on differing sides of the abortion issue. In our Baptist tradition the integrity of each person's conscience must be respected; therefore, we believe that abortion must be a matter of responsible, personal decision.

AMERICAN ETHICAL UNION
(1965, reaffirmed 1979)

Abridgement of individual civil and human liberties as guaranteed by the United States Constitution is a danger to all. Among those liberties that must continue free of threat is the right of every woman to self-determination insofar as continued pregnancy is concerned.

AMERICAN FRIENDS SERVICE COMMITTEE
(1970)

On religious, moral, and humanitarian grounds, therefore, we arrived at the view that it is far better to end an unwanted pregnancy than to encourage the evils resulting from forced pregnancy and childbirth. At the center of our position is a profound respect and reverence for human life, not only that of the potential human being who should never have been conceived, but that of the parent, the other children and the community of man.

Believing that abortion should be subject to the same regulations and safeguards as those governing other medical and surgical procedures, we urge the repeal of all laws limiting either the circumstances under which a woman may have an abortion or the physician's freedom to use his best professional judgment in performing it.

AMERICAN HUMANIST ASSOCIATION
(Annual Conference, 1977)

We affirm the moral right of women to become pregnant by choice and to become mothers by choice. We affirm the moral right of women to freely choose a termination of unwanted pregnancies. We oppose actions by individuals, organizations and governmental bodies that attempt to restrict and limit the women's moral right and obligation of responsible parenthood.

AMERICAN JEWISH CONGRESS
(Biennial Convention, 1982)

The American Jewish Congress has long recognized that reproductive freedom is a fundamental right, grounded in the most basic notions of personal privacy, individual integrity and religious liberty. Jewish religious traditions hold that a woman must be left to her own conscience and God to decide for herself what is morally correct. The fundamental right to privacy applies to

contraception to avoid unintended pregnancy as well as to freedom of choice on abortion to prevent an unwanted birth.

The American Jewish Congress, therefore,

--Reaffirms its unwavering support for the Supreme Court decisions, including Roe v. Wade and Doe v. Bolton, which recognize that the Constitution guarantees women freedom of choice with respect to abortion.

--Reaffirms its opposition to all efforts--whether through Constitutional amendment, simple legislative fiat, or attacks on the jurisdiction of the courts--that would restrict or burden a woman's right to choose to terminate a pregnancy.

--Rejects any efforts that would deny individual religious liberty to either clergy or lay people who, by virtue of their sincerely-held religious beliefs, may differ in interpreting when to attribute

"personhood" to prenatal life.

BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
(1973)

It was voted that the Baptist Joint Committee on Public Affairs go on record as opposed to the Buckley-Hatfield amendment and any like or similar constitutional amendments, and that the staff be authorized to take all available action to oppose them.

B'NAI B'RITH WOMEN
(Biennial Convention, 1976,
reaffirmed, 1978)

We wholeheartedly support the concepts of individual freedom of conscience and choice in the matter of abortion. Any constitutional amendment prohibiting abortion would deny to the population at large their basic rights to follow their own teachings and attitudes on this subject which would threaten First Amendment rights.

CATHOLIC WOMEN FOR REPRODUCTIVE RIGHTS
(1985)

CWFRR joins people of other religious

traditions in respecting the pluralism of religious, moral and ethical views. Thus we support the Supreme Court decisions which promote First Amendment freedoms by leaving each woman free to follow her own moral and religious convictions about abortion.

CWFRR, with faithful Catholic theologians, married couples, sisters and many other individuals and groups, dissents from the position taken by the hierarchy of the Catholic Church that every abortion is morally wrong. CWFRR affirms that there are circumstances in which a woman's choice to have an abortion may be morally justifiable.

CWFRR thus opposes all legislation which would in any way restrict a woman's right to control her reproduction.

CATHOLICS FOR A FREE CHOICE
(1975)

We affirm the religious liberty of Catholic women and men and those of other religions to make decisions regarding their

own fertility free from church or governmental intervention in accordance with their own individual conscience.

CENTRAL CONFERENCE OF AMERICAN RABBIS
(Annual Convention, 1975)

We believe that in any decision whether or not to terminate a pregnancy, the individual family or woman must weigh the tradition as they struggle to formulate their own religious and moral criteria to reach their own personal decision. We believe that the proper focus for formulating these relgious and moral criteria and for making this decision must be the individual family or woman and not the state or other external agency.

As we would not impose the historic position of Jewish teaching upon individuals nor legislate as normative for society at large, so we would not wish the position of any other group imposed on the Jewish community or the general population.

We affirm the legal right of a family or a woman to determine on the basis of their or her own religious and moral values whether or not to terminate a particular pregnancy. We reject all constitutional amendments which would abridge or circumscribe this right.

CHRISTIAN CHURCH (DISCIPLES OF CHRIST)
(General Assembly, 1975)

WHEREAS, the Christian Church (Discpiles of Christ) has proclaimed that in Christ, God affirms freedom and responsibility for individuals, and

WHEREAS, legislation is being introduced into the U.S. Congress which would embody in law one particular opinion concerning the morality of abortion...

THEREFORE BE IT RESOLVED, that the General Assembly of the Christian Church (Disciples of Christ)

--Affirm the principle of individual liberty, freedom of individual conscience, and sacredness of life for all persons.

--Respect differences in religious beliefs concerning abortion and oppose, in accord with the principle of religious liberty, any attempt to legislate a specific religious opinion or belief concerning abortion upon all Americans.

EPISCOPAL CHURCH
(General Convention, 1982)

RESOLVED: That the Episcopal Church express its unequivocal opposition to any legislation on the part of the national or state governments which would abridge or deny the right of individuals to reach informed decisions in this matter and to act upon them.

EPISCOPAL WOMEN'S CAUCUS
(Annual Meeting, 1978)

We are deeply disturbed over the increasingly bitter and divisive battle being waged in legislative bodies to force continuance of unwanted pregnancies and to limit an American woman's right to abortion.

We believe that all should be free to exercise their own consciences on this matter and that where widely differing views are held by substantial sections of the American religious community, the particular belief of one religious body should not be forced on those who believe otherwise.

FEDERATION OF RECONSTRUCTIONIST CONGREGATIONS AND HAVUROT (1981)

Although the Jewish tradition regards children as a blessing, a gift of life itself, the tradition permits the abortion of an unborn child in order to safeguard the life and the physical and mental health of the mother. The rabbis did not take a consistent stand on the question of whether a fetus resembles "a person." They did not think it possible to arrive at a final theoretical answer to the question of abortion, for that would mean nothing less than to be able to define convincingly what

it means to be human.

We recognize that abortion is a tragic choice. Any prospective parent must make an agonizing decision between competing claims--the fetus, health, the need to support oneself and one's family, the need for time for a marriage to stabilize, responsibility for other children and the like. Some of us consider abortion to be immoral except under the most extraordinary circumstances. Yet we all empathize with the anguish of those who must make the decision to abort or not to abort.

LUTHERAN CHURCH IN AMERICA
(Biennial Convention, 1970,
reaffirmed 1978)

Since the fetus is the organic beginning of human life, the termination of its development is always a serious matter. Nevertheless, a qualitative distinction must be made between its claims and the rights of a responsible person made in God's image who

is in living relationships with God and other human beings. This understanding of responsible personhood is congruent with the historical Lutheran teaching and practice whereby only living persons are baptized.

On the basis of the evangelical ethic, a woman or couple may decide responsibly to seek an abortion. Earnest consideration should be given to the life and total health of the mother, her responsibilities to others in her family, the stage of development of the fetus, the economic and psychological stability of the home, the laws of the land, and the consequences for society as a whole.

MORAVIAN CHURCH IN AMERICA,
NORTHERN PROVINCE
(1974)

Whereas the Moravian Church believes in the sacredness of life and in the quality of life, and whereas we believe that abortion should not be used as a method of birth control nor a means of controlling

population, and whereas Christian faith calls us to affirm the freedom of persons as well as the sanctity of life, be it resolved that abortion should be a matter of responsible personal decision, with continuing counseling provided if desired.

NATIONAL COALITION OF AMERICAN NUNS
(1982)

For thirteen years, the National Coalition of American Nuns has debated the abortion issue.

While we continue to oppose abortion, in principle and in practice, we are likewise convinced that the responsibility for decisions in this regard resides primarily with those who are directly and personally involved.

NATIONAL COUNCIL OF JEWISH WOMEN
(National Convention, 1969,
reaffirmed, 1979, 1982)

The members of NCJW reaffirm the strong commitment "to work to protect every woman's individual right to choose abortion and to

eliminate any obstacles that would limit her reproductive freedom."

NATIONAL FEDERATION OF TEMPLE SISTERHOODS
(Biennial Assembly, 1975)

NFTS affirms our strong support for the right of a woman to obtain a legal abortion, under conditions now outlined in the 1973 decision of the United States Supreme Court. The Court's position established that during the first two trimesters, the private and personal decision of whether or not to continue to terminate an unwanted pregnancy should remain a matter of choice for the woman; she alone can exercise her ethical and religious judgment in this decision.

Only by vigorously supporting this individual right to choose can we also ensure that every woman may act according to the religious and ethical tenets to which she adheres.

NATIONAL SERVICE CONFERENCE,
AMERICAN ETHICAL UNION
(1976, reaffirmed 1979)

We believe in the right of each individual to exercise his or her conscience; every woman has a civil and human right to determine whether or not to continue her pregnancy. We support the decision of the United States Supreme Court of January 22, 1973 regarding abortion.

We believe that no religious belief should be legislated into the legal structure of our country; the state must be neutral in all matters related to religious concepts.

NORTH AMERICAN FEDERATION OF TEMPLE YOUTH
(1981)

BE IT RESOLVED: that NFTY continues to strongly support the right of a woman to choose to obtain a safe, legal abortion, and that NFTY opposes any constitutional amendment that could lead to the restriction of that right.

PIONEER WOMEN/NA'AMAT
(Biennial Convention, 1983)

Reproductive choice must be recognized as a matter of individual conscience outside the realm of government intrusion. We oppose attempts--whether by Constitutional amendment, legislation, judicial review or government regulation--to restrict women's access to safe and legal abortion, to bar financial assistance to women seeking abortion or to violate the confidentiality of family planning services.

PRESBYTERIAN CHURCH, U.S.A.
(General Assembly, 1983)

The church's position on public policy concerning abortion should reflect respect for other religious traditions and advocacy for full exercise of religious liberty. The Presbyterian Church exists within a very pluralistic environment. Its own members hold a variety of views. It is exactly this pluralism of beliefs which lead us to the

conviction that the decision regarding abortion must remain with the individual, to be made on the basis of conscience and personal religious principles, and free from governmental interference.

Consequently, we have a responsibility to work to maintain a public policy of elective abortion, regulated by the health code, not the criminal code. The legal right to have an abortion is a necessary prerequisite to the exercise of conscience in abortion decisions. Legally speaking, abortion should be a woman's right because, theologically speaking, making a decision about abortion is, above all, her responsibility.

As Presbyterians and U.S. citizens we have a responsibility to guarantee every woman the freedom of reproductive choice. We affirm the intent of existing law in the United States regarding abortion: protecting

the pregnant woman.

REFORMED CHURCH IN AMERICA
(General Synod, 1975)

To use, or not to use, legal abortion should be a carefully considered decision of all the persons involved, made prayerfully in the love of Jesus Christ.

Christians and the Christian community should play a supportive role for persons making a decision about or utilizing abortion.

REORGANIZED CHURCH OF JESUS CHRIST
OF LATTER DAY SAINTS
(1974, reaffirmed 1980)

We affirm that parenthood is partnership with God in the creative processes of the universe.

We affirm the necessity for parents to make responsible decisions regarding the conception and nurture of their children.

We affirm a profound regard for the personhood of the woman in her emotional, mental and physical health; we also affirm a

profound regard and concern for the potential of the unborn fetus.

We affirm the inadequacy of simplistic answers that regard all abortions as murder or, on the other hand, regard abortion only as a medical procedure without moral significance.

We affirm the right of the woman to make her own decision regarding the continuation or termination of problem pregnancies.

UNION OF AMERICAN HEBREW CONGREGATIONS
(Biennial Convention, 1975,
reaffirmed, 1981)

The UAHC reaffirms its strong support for the right of a woman to obtain a legal abortion on the constitutional grounds enunciated by the Supreme Court in its 1973 decision...This rule is a sound and enlightened position on this sensitive and difficult issue, and we express our confidence in the ability of the woman to exercise her ethical and religious judgment

in making her decision.

The Supreme Court held that the question of when life begins is a matter of religious belief and not medical or legal fact. While recognizing the right of religious groups whose beliefs differ from ours to follow the dictates of their faith in this matter, we vigorously oppose the attempts to legislate the particular beliefs of those groups into the law which governs us all. This is a clear violation of the First Amendment. Furthermore, it may undermine the development of interfaith activities. Mutual respect and tolerance must remain the foundation of interreligious relations.

UNITARIAN UNIVERSALIST ASSOCIATION
(General Assembly, 1978)

WHEREAS, religious freedom under the Bill of Rights is a cherished American right; and

WHEREAS, right to choice on contraception and abortion are important

aspects to the right of privacy, respect for human life and freedom of conscience of women and their families; and

WHEREAS, there is increasing religious and political pressure in the United States to deny the foregoing rights;

BE IT RESOLVED: That the 1978 General Assembly of the Unitarian Universalist Association once again affirms the 1973 decision of the Supreme Court of the United States on abortion and the member societies and individual members

BE IT FURTHER RESOLVED: That the 1978 General Assembly of the Unitarian Universalist Association strongly opposes any denial or restriction of federal funds, or any Constitutional amendment, or the calling of a national Constitutional Convention to propose a Constitutional amendment, that would prohibit or restrict access to legal abortion.

UNITARIAN UNIVERSALIST WOMEN'S FEDERATION
(Biennial Convention, 1975,
reaffirmed 1979, 1981)

The Unitarian Universalist Women's Federation reaffirm[s] the right of any woman of any age or marital or economic status to have an abortion at her own request upon consultation with her physician.

UNITED CHURCH OF CHRIST
(General Synod, 1981)

The question of when life [personhood] begins is basic to the abortion debate. It is primarily a theological question, on which denominations or religious groups must be permitted to establish and follow their own teachings.

Every woman must have the freedom of choice to follow her personal and religious and moral convictions concerning the completion or termination of her pregnancy.

UNITED METHODIST CHURCH
(General Conference, 1976, 1984)

When an unacceptable pregnancy occurs, a family, and most of all the pregnant woman, is confronted with the need to make a difficult decision. We believe that continuance of a pregnancy which endangers the life or health of the mother, or poses other serious problems concerning the life, health, or mental capability of the child to be, is not a moral necessity. In such a case, we believe the path of mature Christian judgment may indicate the advisability of abortion. We support the legal right to abortion as established by the 1973 Supreme Court decisions. We encourage women in counsel with husbands, doctors, and pastors to make their own responsible decisions concerning the personal or moral questions surrounding the issue of abortion. (Resolution on Responsibile Parenthood, 1976).

Our belief in the sanctity of unborn human life makes us reluctant to approve abortion. But we are equally bound to respect the sacredness of the life and well-being of the mother, for whom devastating damage may result from an unacceptable pregnancy. In continuity with past Christian teaching, we recognize tragic conflicts of life with life that may justify abortion (Social Principles, 1984).

UNITED METHODIST CHURCH,
NATIONAL YOUTH MINISTRY ORGANIZATION
(Biennial Convocation, 1983)

Freedom of choice in problem pregnancies must be based on the moral judgment of the involved individuals.

Where there is no consistent medical, ethical, or theological consensus, the U.S. Constitution should not be used to force one theological view on all citizens who may believe otherwise.

The U.S. Supreme Court decision of Roe

v. Wade in 1973 guarantees a woman the right to make a personal decision regarding termination of a pregnancy. Any amendment to deconstitutionalize the issue of abortion and invalidate the 1973 decision could set a precedent for endangering all our civil liberties.

UNITED METHODIST CHURCH, WOMEN'S CHURCH, GENERAL BOARD OF GLOBAL MINISTRIES (1975, reaffirmed 1979, 1980)

We believe deeply that all should be free to express and practice their own moral judgment on the matter of abortion. We also believe that on this matter, where there is no ethical or theological consensus, and where widely differing views are held by substantial sections of the religious community, the Constitution should not be used to enforce one particular religious belief on those who believe otherwise.

UNITED PRESBYTERIAN CHURCH IN THE U.S.A.
(General Assembly, 1972,
reaffirmed 1978)

Whereas, God has given persons the responsibility of caring for creation as well as the ability to share in it, and has shown his concern for the quality and value of human life; and

Whereas, sometimes when the natural ability to create life and the moral and spiritual ability to sustain it are not in harmony, the decisions to be made must be understood as moral and ethical ones and not simply legal;

Therefore, in support of the concern for the value of human life and human wholeness...the 184th General Assembly:

b. Declares that women should have full freedom of personal choice concerning the competion or termination of their pregnancies bnd that artificial or induced termination of pregnancy, therefore, should not be

restricted by law, except that it be performed under the direction and control of a properly licensed physician.

UNITED SYNAGOGUE OF AMERICA
(Biennial Convention, 1975)

"In all cases 'the mother's life takes precedence over that of the foetus' up to the minute of its birth. This is to us an unequivocal principle. A threat to her basic health is moreover equated with a threat to her life. To go a step further, a classical responsum places danger to one's psychological health, when well established, on an equal footing with a threat to one's physical health." (1967)

(A)bortions, "though serious even in the early stages of conception, are not to be equated with murder, hardly more than is the decision not to become pregnant."

The United Synagogue affirms once again its position that "abortions involve very serious psychological, religious, and moral

problems, but the welfare of the mother must always be our primary concern."

WOMEN OF THE EPISCOPAL CHURCH
(Triennial Meeting, 1973)

WHEREAS the Church stands for the exercise of freedom of conscience by all and is required to fight for the right of everyone to exercise that conscience, THEREFORE, BE IT RESOLVED that the decision of the U.S. Supreme Court allowing women to exercise their conscience in the matter of abortion be endorsed by the Church.

WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM
(Biennial Convention, 1982)

Reverence for life is the cornerstone of our Jewish heritage. Since abortion in Jewish law is primarily for the mother's physical or mental welfare we deplore the burgeoning casual use of abortion. Abortion should be "legally available, but ethically restricted. Though the abortion of a fetus is not equivalent to taking an <u>actual</u> life,

it does represent the destruction of potential life and must not be undertaken lightly...."

However, Women's League also believes that the practice of the principle of the separation of church and state guaranteed by our Constitution has kept our nation strong and preserved full freedom for the individual. Women's League believes that transmitting religious values is the responsibility of the religious sector.

YOUNG WOMEN'S CHRISTIAN
ASSOCIATION OF THE U.S.A.
(1979)

As an organization rooted in the Christian faith, the YWCA is deeply conscious of the difficult personal and ethical choices raised by the issue of abortion.

The position of the YWCA is not "pro-abortion." It is a position supporting a woman's right to make an individual decision based upon her own religious and

ethical beliefs and her physician's guidance. The answer to the question, "When does personhood begin?" must remain in the ethical and religious realm.

Since there is a wide variation of opinion among religious groups and individuals in our pluralistic society as to when personhood begins and what an ethical decision on abortion may be in different circumstances, the YWCA holds that no <u>one</u> religious belief should be mandated by law. Our government is expressly comManded to make no law establishing any one religion or prohibiting free expression of religion.

APPENDIX D

A CALL TO CONCERN
(Signed by 220 American religious ethicists in 1978)

The increasing urgency of the issue of abortion rights requires us as teachers and writers of religious ethics to speak out.

Abortion is a serious and sometimes tragic procedure for dealing with fetal life. It raises important ethical issues and cannot be blandly legitimized by the mere whim of an individual. Nevertheless, it belongs in that large realm of often tragic sctions where circumstances can render it a less destructive procedure than the rigid prolongation of pregnancy.

We support the Supreme Court decisions of 1973 which had the effect of removing abortion from the criminal law codes. The Court did not appeal to religion or ethics in arriving at its judgment, but we believe the

decision to have been in accord with sound ethical judgment. Taking note of the fact that theologians, as well as other experts, disagree on the fundamental moral question of when life begins, the Court decided that the law ought not to compel the conscience of those WHo believe abortion to be in harmony with their moral convictions.

In the last four years, however, those decisions have been subjected to a relentless attack from those who take the absolutist position that it is always wrong to terminate a pregnancy at any time after the moment of conception. Those who take this absolutist position have not hesitated to equate abortion at any stage of pregnancy with murder or manslaughter. From such an extreme viewpoint, all legal means are considered justified if they limit abortion, no matter what the human consequences for poor women and others--as in the recent efforts to deny

Medicaid funds and to prohibit use of public hospitals for abortion services.

We feel compelled to affirm an alternative position as a matter of conscience and professional responsibility.

1. The most compelling argument against the inflexibility of the absolutist position is its cost in human misery. The absolutist position does not concern itself about the quality of the entire life cycle, the health and well-being of the mother and family, the question of emotional and economic resources, the cases of extreme deformity. Its total preoccupation with the status of the unborn renders it blind to the well-being and freedom of choice of persons in community.

2. "Pro-life" must not be limited to concern for the unborn; it must include a concern for the quality of life as a whole. The affirmation of life in Judeao-Christian ethics requires a commitment to make life

healthy and whole from beginning to end. Considering the best medical advice, the best moral insight, and a concern for the total quality of the whole life cycle for the born and the unborn, we believe that abortion may in some instances be the most loving act possible.

3. We believe it is wrong to deny Medicaid assistance to poor women seeking abortions. This denial makes it difficult for those who need it most to exercise a legal right, and it implies public censure of a form of medical service which in fact has the moral support of major religious groups.

4. We are saddened by the heavy institutional involvement of the bishops of the Roman Catholic Church in a campaign to enact religiously-based anti-abortion commitments into law, and we view this as a seirous threat to religious liberty and freedom of conscience. We acknowledge the

legal right of all individuals and groups, both religious and secular, to seek laws that reflect their religious and ethical beliefs. But the institutional mobilization of Roman Catholic dioceses, including massive financial contributions by those dioceses to the National Committee for a Human Life Amendment, is inappropriate on this issue. If successful, it would violate the deeply held religious convictions of individual members and official bodies of many other religious groups about when human personhood begins, the relative rights of a woman and a fetus, and responsible family life. This is particularly a problem when there is no clear majority opinion on these fundamental issues nor an adequate social base of consensus for legitimate and enforceable legislation.

5. <u>We call upon the leaders of religious groups supporting abortion rights to speak out more clearly and publicly in</u>

response to the dangerously increasing influence of the absolutist position. There may be some ecumenical risks in such candor, but those risks have already been assumed by those who have pressed the absolutist position on religious grounds. In the long run, the true test of ecumenical authenticity is the ability to sustain dialogue and friendship in spite of very sharp disagreements on matters of substance.

Supreme Court, U.S.
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Nos. 84-495 and 84-1379

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ALLAN G. CHARLES, *et al.*,
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On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

Interest of *Amicus Curiae*

Robert Abrams, as Attorney General of the State of New York, submits this brief as *amicus curiae* pursuant to Supreme Court Rule 36.4.

Since 1970, the State of New York has recognized that the right of privacy incorporates the right of a woman to choose to terminate her pregnancy up to the point of viability, subject to reasonable restrictions calculated to protect the health and safety of the woman. *Byrn* v. *New York City Health & Hospitals Corp.*, 31 N.Y. 2d 194 (1972); N.Y. Penal Law § 123.05(3). This Court likewise recognized, in 1973, that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973).

If *Roe* v. *Wade* were to be overruled, as urged by the Solicitor General,* and New York were to adhere to its tradition of recognizing the right of a woman to choose to have an abortion, New York and other states choosing to uphold such a right would be faced with meeting an enormous demand for the service from out-of-state residents. The magnitude of this demand would be extraordinary, given the wide acceptance of and reliance upon abortion since *Roe v. Wade* was decided.

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* The brief submitted by the Solicitor General as *amicus curiae* will be cited as "S.G. at ——."

In explicitly recognizing that the right to choose to have an abortion is implicit in the right of privacy protected by our Constitution, this Court guaranteed that its exercise, as with the exercise of other constitutionally protected rights, would not be dependent upon the vicissitudes of political controversy. *See Engel* v. *Vitale*, 370 U.S. 421, 429-30 (1962); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943). The decision whether to obtain an abortion, as with other deeply personal choices regarding privacy and reproductive decisions intertwined with religious and moral beliefs, is precisely the type of right most in need of such explicit constitutional protection. New York has aggressively protected its citizens from attacks upon these rights in the past, and therefore submits this brief *amicus curiae* in response to that submitted by the Solicitor General urging this Court to overrule *Roe* v. *Wade*.

Statement of the Cases

In *Thornburgh* v. *American College of Obstetricians and Gynecologists*, No. 84-495, the Court of Appeals for the Third Circuit held unconstitutional sections of a Pennsylvania law requiring that the method of abortion used be one that would most likely result in a live birth, even if it would cause greater (though not significantly greater) risk to the mother; that a second doctor be present for all post-viability abortions even if a medical emergency dictates an immediate abortion; that certain information be provided to a patient before an abortion is performed, for the purpose, as the court found, of dissuading the woman from having an abortion, regardless of whether the woman's physician deems the information relevant to her decision; and that fa-

cilities providing abortion services file detailed reports subject to public disclosure. The court also enjoined operation of a provision that required a minor seeking an abortion to obtain parental consent or a court order, on the ground that no safeguards had been adopted to ensure that the judicial alternative would be expeditious and would protect the minor's confidentiality.

In *Diamond* v. *Charles*, No. 84-1379, the Court of Appeals for the Seventh Circuit held unconstitutional a section of Illinois law that made it a felony to fail to conform to a specified standard of care in performing an abortion, and thereby to cause the death of a viable fetus, finding that the provision failed to afford due deference to the viability determination of the attending physician and was impermissibly vague. A similar provision as to "possibly viable" fetuses was held unconstitutional because it ran afoul of *Roe* v. *Wade*'s holding that the State does not have a compelling interest in protecting fetuses unless they are actually viable. The Seventh Circuit also struck down a requirement that physicians inform women that certain birth control methods are "abortifacients," defined as any substance or device known to cause fetal death. A fetus is in turn defined to include a fertilized cell, thus making an intrauterine device, and other common means of birth control, abortifacients. The lower court held that the statute impermissibly imposed the State's theory of when life begins upon the physician and the patient.

None of the parties in these two cases urged that *Roe* v. *Wade* be overruled. Indeed, both cases have been consistently briefed and argued within the framework established by *Roe* v. *Wade* and subsequent cases. *E.g., City of Akron*

v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). The Department of Justice is not a party to either case. Nonetheless, the Solicitor General has taken the extraordinary step of using these two cases to urge the Court to perform an unprecedented *volte-face*. The Government asks that the right to choose to have an abortion be repudiated and that an independent right of privacy, on which the right of abortion is based, be eliminated from the freedoms protected by our Constitution.

Summary of Argument

The Solicitor General's arguments are without merit. They ignore a firmly established line of precedent protecting our rights to be left alone by government, to choose how to conduct our own lives, and to decide for ourselves when and whether to marry or to conceive or bear children. *E.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Moreover, they disregard the important principle of *stare decisis*, a principle recognized by this Court in this very context just two years ago. *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983). Finally, they ignore the very real likelihood of social and political chaos should this Court overrule *Roe* v. *Wade*.

ARGUMENT

Only twelve years ago, this Court held that the right of personal privacy—which finds its doctrinal sources in decisions dating back to the nineteenth century—"is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973). The Court has adhered to this principle in no fewer than twelve cases in the ensuing years.* Because this Court has consistently and repeatedly followed its decision, the right recognized in *Roe* has become not only a part of our constitutional landscape, but an element widely perceived to be part of the nation's social fabric.

The reasons for adhering to *stare decisis*, generally and in this context, are manifold. Among them are

> the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). Even as to constitutional questions, "any depar-

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* *See, City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983); *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983); *H.L.* v. *Matheson*, 450 U.S. 398 (1981); *Harris* v. *McRae*, 448 U.S. 297 (1980); *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Connecticut* v. *Menillo*, 423 U.S. 9 (1975).

ture from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, —— U.S. ——, ——, 104 S.Ct. 2305, 2311 (1984). For "in a society governed by the rule of law," the doctrine of *stare decisis* "demands respect." *Solem* v. *Helm*, 463 U.S. 277, 311 (1983) (Burger, C.J., dissenting), *quoting City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. at 419-20.

Undoubtedly, the passions, both moral and political, which surround the abortion debate have motivated some to counsel the Court to depart from recent decisions. Passionate debate, however, attends many issues which implicate constitutional concerns, and its tenacity surely cannot be an acceptable basis for abjuring reasoned adherence to announced principles. Only by "circumspect observance" of the principle of *stare decisis* "can the wisdom of this Court as an institution transcending the moment . . . be brought to bear on the difficult problems that confront [it]." *Green* v. *United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting). *See Oregon* v. *Kennedy*, 456 U.S. 667, 691-92 n. 34 (1982) (Stevens, J., concurring).

Indeed, this Court only two years ago found "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*." *Akron*, 462 U.S. at 419-20 n.1. Among them were the special consideration afforded the issues in *Roe*, and the repeated adherence in subsequent cases to the basic principle there announced. *Id.* No doctrinal development has appeared since *Roe* v. *Wade*, much less *Akron*, that in any sense diminishes the Court's conclusion that the right to privacy encompasses the right of a woman to choose whether to terminate a pregnancy.

Each of the so-called "textual, historical, and doctrinal" flaws of *Roe* v. *Wade* decried by the Solicitor General, S.G. at 2, was identified by the dissenters in *Roe* and rejected by the Court. Thus, it was argued that the historical coincidence of the passage of laws criminalizing abortion with the passage of the Fourteenth Amendment supports the contention that the Amendment was not intended to restrict such legislative action, 410 U.S. at 174-77 (Rehnquist, J., dissenting); that the right of privacy, as previously identified by the Court, had no application in the abortion area, *id.* 172-73; and that barring state legislatures, as a matter of constitutional law, from entering into the area of procreative choice, in the absence of textual support, amounted to judicial legislation and usurpation of majoritarian prerogatives, *id.*; *Doe* v. *Bolton*, 410 U.S. 179, 221-23 (1973) (White, J., dissenting). The Solicitor General brings nothing new to the arguments, and cites not one case decided since *Roe* in support of them.

Since *Roe* v. *Wade*, the Court has been called to delineate more fully the fundamental right to choose an abortion. In varying factual circumstances, it has had to weigh the states' competing interests in protecting maternal health and in the future health of the fetus. The continuing need for the Court to furnish guidance in this area does not, however, argue for a doctrinal retraction of *Roe* v. *Wade*. Constitutional adjudication of rights secured by the Bill of Rights often involves difficult tasks of redefinition and line drawing. Obviously, individual rights cannot be jettisoned merely because their application in varrying contexts may be difficult. To cite but one example, for more than a generation this Court has wrestled with the question of religious observances in the public schools, *see Wallace* v.

Jaffree, —— U.S. ——, 105 S.Ct. 2479 (1985), without retreating from the principles announced in *Engel* v. *Vitale*, 370 U.S. 421 (1962).

Both the states and countless individuals have relied upon the rights secured by *Roe* v. *Wade* and its progeny in ordering their affairs and lives. Based on these decisions, states have attempted to establish a uniform framework within which health planning and regulatory decisions can be made. *See e.g., Westchester Women's Health Organization, Inc.* v. *Whalen*, 475 F. Supp. 734 (S.D.N.Y. 1979) (state licensing regulations for ambulatory care clinics providing abortion services are within the guidelines enunciated by this Court); *Roman Catholic Diocese* v. *New York State Department of Health*, —— A.D.2d ——, 490 N.Y.S.2d 636 (3d Dept. 1985) (New York relied on *Akron* in deciding to approve the addition of abortion services to two family planning out-patient clinics); *Schulman* v. *New York City Health & Hospitals Corp.*, 38 N.Y.2d 234 (1975) (reporting requirements of the New York City Health Code within the strictures of *Roe* v. *Wade*).

The overruling of *Roe* v. *Wade* would impose an extraordinary burden upon those states which would continue to allow women to choose to terminate their pregnancies in the face of decisions by other states not to do so. For example, when New York amended its penal law in 1970 to permit licensed physicians to provide abortion services for any consenting woman less than twenty-four weeks pregnant, N.Y. Penal Law § 125.05(3), the State was flooded with women seeking this service.* The magnitude of the burden

* During the first fifteen months after this liberalized bill became effective, 64.5 percent of the abortions performed in New York City were performed on non-residents. Guttmacher, *The Genesis of Lib-*

(footnote continued on next page)

that would be imposed upon New York should *Roe* v. *Wade* be rejected would be all the greater than it was in 1970, given the increased acceptance of abortion in our society and the increased demand for it since *Roe* v. *Wade* was decided.

Individuals have relied upon the right of privacy, which encompasses the right to choose to have an abortion, in planning their families and controlling their destinies. If *Roe* v. *Wade* is overruled, as the Solicitor General urges, and the fundamental right of privacy called into question, an individual's ability to plan when to have children, and to insure that each child is a wanted child, will be left largely to chance, depending upon the state in which one resides, the latest election or whether one is rich or poor.

As with the school prayer issue, the continuing controversy over the right to an abortion makes it clear that such an important right cannot be left to shifting political majorities.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, and free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

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eralized Abortion in New York, 23 Case W. Res. L. Rev. 756, 766 (1972). During the first twelve months alone, approximately 55,000 women from eight states alone—New Jersey, Ohio, Michigan, Illinois, Pennsylvania, Florida, Massachusetts and Connecticut—traveled to New York City to obtain legal abortions. *Id.*

West Virginia State Board of Education v. *Barnette*, 319 U.S. at 638; *see Engel* v. *Vitale*, 370 U.S. at 429-30.* Any decision undercutting *Roe* v. *Wade* and its underlying principles would make it impossible for "citizens [to] have confidence that the rules on which they rely in ordering their affairs . . . , are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Department of Health* v. *Florida Nursing Home Association*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) (footnote omitted).

In deciding *Roe* v. *Wade*, the Court confronted the need to give meaning to the concept of due process, a concept that "has not been reduced to any formula; its content cannot be determined by reference to any code." *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Aware that "liberty" is not merely "a series of isolated points pricked out" in terms of guarantees of the Bill of Rights,

* The New York Legislature, for example, repealed New York's abortion statute in 1972, but then Governor Rockefeller vetoed the repeal, reminding the Legislature of the Report of the Governor's Commission Appointed to Review New York State's Abortion Law (March 1968), which found that "the then-existing, 19th century, near-total prohibition against abortion was fostering hundreds of thousands of illegal and dangerous abortions. . . . discriminating against women of modest means. . . . , promoting hypocrisy and, ultimately, human tragedy. . . . I can see no justification now for repealing this reform and thus condemning hundreds of thousands of women to the dark age once again." Governor's Veto Messages, 1972, *reprinted* in N.Y.S. Legis. Annual-1972, at 423. Significantly, Governor Rockefeller noted,

> the extremes of personal vilification and political coercion brought to bear on members of the Legislature raise serious doubts that the votes to repeal the reforms represented the will of the majority of the people of New York State. The very intensity of this debate has generated an emotional climate in which the very truth about abortions and about the present State abortion law have become distorted almost beyond recognition.

Id.

id., at 543, the Court proceeded to fill out the "vague contours of the Due Process Clause," *Rochin* v. *California*, 342 U.S. 165, 170 (1952),* mindful that its judgment could not be rooted in "personal and private notions," and that it must exercise its judgment "upon interests of society pushing in opposite directions." *Id.*, at 171.**

The constitutional terrain described in *Roe* v. *Wade* is an area in which the Court, in a series of decisions, long ago marked out a "zone of privacy created by several fundamental constitutional guarantees," *Griswold* v. *Connecticut*, 381 U.S. at 485, in matters relating to child rearing, mar-

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* Though confessing that the words of the Due Process Clause "do not interpret themselves," S.G. at 24, and that the provision does not merely prohibit the government from "actually taking hold of a person, as to confine him, without fair procedures," S.G. at 25, the Solicitor General would limit the meaning of liberty to those protections expressly guaranteed by the Bill of Rights. This view of the Due Process Clause, fully accepted by only one member of the Court, *see Griswold* v. *Connecticut*, 381 U.S. at 507-27 (Black, J., dissenting), was rejected even by the Justices dissenting in *Roe* v. *Wade*. *See Griswold* v. *Connecticut*, 381 U.S. at 502-07 (White, J., concurring); *Roe* v. *Wade*, 410 U.S. at 172-73 (Rehnquist, J., dissenting).

** It is neither illogical nor "demoralizing," S.G. at 25, that the Court, at the same time it has refrained from invalidating legislation aimed at curing social evils arising out of industrial life, *e.g. West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), has shown special solicitude for *personal* freedom "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). This responds to an observable distinction between state intrusions upon such "economic freedoms" as the ability to pay substandard wages and state intrusions into time-honored, intimate relationships and decisions. Thus, it has long been recognized that "in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

riage and procreation.* A repudiation of the principles announced in *Roe* v. *Wade* would therefore also remove the constitutional girders of some of this Court's most important decisions in this century.

In *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), for example, the Court struck down under the Due Process Clause a statute that prohibited the teaching of foreign languages to children. It found that the state had intruded into a protected liberty interest because the legislation "materially . . . interfere[d] . . . with the power of parents to control the education of their own." *Id.* at 401. In *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Court invalidated a state law requiring parents to send children to public, rather than parochial, school because the legislation "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control." *Id.* at 534-35. These decisions recognized that the Due Process Clause protects a "private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158,

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* As this Court stated in *Roe* v. *Wade*, 410 U.S. at 152:

> In a line of decisions . . . going back perhaps as far a *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry* v. *Ohio*, 392 U.S. 1, 8-9 (1968); *Katz* v. *United States*, 389 U.S. 347, 350 (1967); *Boyd* v. *United States*, 116 U.S. 616 (1886); *see Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut*, 381 U.S. at 484-485; in the Ninth Amendment; *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, *see Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).

166 (1944);* *Poe* v. *Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting).

So, too, has the Court scrutinized and invalidated state legislation encroaching on the ability of citizens to marry. *Loving* v. *Virginia*, 388 U.S. 1 (1967). In *Loving*, the Court reversed convictions under a statute that made inter-racial marriage a criminal offense. While the Court held that the statute was invalid because it violated the "central meaning of the Equal Protection Clause," *id.* at 12, the Court relied equally on the Due Process Clause when it held the statute invalid, finding that it deprived persons of the freedom to marry, "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* *See Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978).

In *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), the Court struck down a state statute authorizing the sterilization of repeated felons, characterizing the ability to procreate as "one of the basic civil rights of man." *Id.*, 316 U.S. at 541.** In *Griswold*, the Court recognized that, just as the state cannot terminate the right to bear children, it cannot invade marital relationships to require couples to bear children by

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* Contrary to the view of the Solicitor General, S.G. at 29, the state regulation under review in *Prince* involved not only restriction on freedom of religion, but, as the Court observed, encroachment on the separate and distinct "rights of parenthood." 321 U.S. at 166.

** *Skinner* cannot be characterized as only an equal protection case. It is an axiom of equal protection analysis that a statutory classification will not be subjected to the searching scrutiny applied in *Skinner* unless the classification is "invidious" or impinges on a fundamental right. *Plyer* v. *Doe*, 457 U.S. 202 (1982). The Court recognized that the classification of different crimes selected by the state in *Skinner* raised "no substantial federal question." 316 U.S. at 540. Rather, it was because the statute derived certain felons, not rationally distinguishable from others, of a "basic liberty" that it was held invalid.

denying them the use of contraceptives. 381 U.S. at 479-80. *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), recognized that the right of privacy guaranteeing the freedom to use contraceptives as a means to control if and when to bear children inheres not only in the marital relationship:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear a child or beget a child. *See Stanley* v. *Georgia*, 394 U.S. 557 (1969). *See also Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29 (1905).

405 U.S. at 453-54 (footnote omitted).

Thus, prior to *Roe* v. *Wade*, the Court had determined that unwarranted intrusions by the state into personal decisions about whom to marry, how to raise and educate children, and when or whether to bear children were proscribed by the guarantee of the Fourteenth Amendment: "nor shall any State deprive any person . . . of liberty . . . without due process of law."

Viewed in this context, it is plain that the Court did not "leap to its conclusion," S.G. at 27, that the right of a woman to choose whether to terminate her pregnancy was encompassed within the right of privacy guaranteed by the Due Process Clause. Rather, the Court carefully considered the rational involved in the cases preceding *Roe* and other factors before it reached its conclusion that the Fourteenth Amendment restricts state action that forbids abortion. *Roe* v. *Wade*, 410 U.S. at 153.

This Court has shown unwavering adherence to its historical reading of the right of privacy in the cases involving abortion since *Roe* v. *Wade*, as well as in matters bearing on conception and family relationships. *E.g.*, *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (invalidating state laws burdening the right to marry); *Carey* v. *Population Services International*, 431 U.S. 678 (1977) (invalidating prohibitions on distribution and advertisement of contraceptives); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (invalidating a zoning law that interfered with decisions as to family composition); *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974) (invalidating an employment rule burdening the woman's decision to bear a child). Because *Roe* v. *Wade* falls squarely within the historical and rational traditions of this Court in elaborating the meaning of the Due Process Clause under which liberty is a "continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints," *Poe* v. *Ullman*, 367 U.S. at 543 (Harlan, J., dissenting), *stare decisis* and the fundamental principles of adjudication of constitutional rights require its reaffirmance in the cases now before this Court.*

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* For the reasons set forth in the opinions of the Third and Seventh Circuits, this Court should affirm the *Thornburgh* and *Diamond* judgments.

Conclusion

For the foregoing reasons, the arguments of the Department of Justice should be rejected, the principles of *Roe* v. *Wade* reaffirmed, and the judgments of the courts below affirmed.

Dated: New York, New York
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Nos. 84-493 and 84-1379

Supreme Court, U.S.
AUG 30 1985
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD THORNBURGH, *et al.*,

Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*,

Appellees.

EUGENE F. DIAMOND, *et al.*,

Appellants,

v.

ALLAN G. CHARLES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF *AMICI CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS, THE COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE NATIONAL LAWYERS GUILD, AND THE NATIONAL TAY-SACHS AND ALLIED DISEASES ASSOCIATION

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INTEREST OF AMICI[1]

THE CENTER FOR CONSTITUTIONAL RIGHTS ("CCR") is a non-profit litigation and educational organization. Founded in 1966 to provide legal support in the Southern civil rights movement, CCR has been a national resource for civil rights and social justice. Securing access to full reproductive rights for all women has been a priority for CCR.

THE COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE ("CARASA") is a New York City-based organization of several hundred women and men dedicated to protecting and furthering women's ability to make choices about their reproductive health and lives, free

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[1]Letters indicating the consent of counsel for all parties to the filing of this brief have been filed with the Clerk of this Court.

from legal, social, and economic constraints. Founded in 1977, in response to the elimination of Medicaid funding for abortion, CARASA has long fought for access to abortion for all women, regardless of income or age, and for an end to coercive sterilization practices. It has also long fought for the availability of social and economic supports--such as child care, adequate wages or public assistance, and affordable housing--so that women who wish to have children can raise them in a safe and healthy environment.

THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE ("NECLC") is a not-for-profit organization dedicated to the defense of the Bill of Rights, particularly for the poor and the powerless. Founded in 1951, the organization has worked to achieve its

goals through litigation and public education. The NECLC is committed to ensuring reproductive freedom for of all women and men.

THE NATIONAL LAWYERS GUILD ("NLG") is an organization of nearly 8,000 lawyers, legal workers, law teachers, and law students. Since its inception in 1937, the NLG has consistently worked on behalf of groups seeking social justice. Many of its members advise and represent women affected by laws which attempt to restrict freedom of choice. The NLG is particularly concerned that allowing the anti-abortion statutes at issue in this case to stand will effectively eliminate options currently available to women and their doctors, forcing women to continue unwanted pregnancies despite the risks they will incur.

THE NATIONAL TAY-SACHS AND ALLIED DISEASES ASSOCIATION is a non-profit organization supporting programs of detection, prevention and research into Tay-Sachs and similar genetic diseases occurring in infants and children. Children afflicted with Tay-Sachs disease, or one of the similar allied diseases, suffer severe mental and physical impairment, resulting in their deaths in infancy or very early childhood. The slow degeneration and eventual death of a child with one of these diseases has devastating and permanent effects on the child's parents and entire family. To help parents through this most difficult time, National Tay-Sachs sponsors a nationwide parent-peer communications network, which allows parents of affected children to obtain the emotional support they can only receive

from other parents of children with the same or similar diseases.

The National Tay-Sachs and Allied Diseases Association, established in 1958, has a membership of approximately 3,000 families. The organization's main purpose is to provide the medical and lay communities with information about the diseases' medical and social implications and the existence of a safe preventative screening measures.

At the close of 1984, approximately 500,000 young adults were screened for Tay-Sachs. Nearly 20,000 carriers have been identified, and over 1,300 pregnancies have been monitored by amniocentesis and chorionic villi sampling (CVS). As of June, 1984, 259 fetuses with Tay-Sachs disease were identified. The other monitored pregnancies resulted in over 1,000 babies being born free of Tay-Sachs disease.

The National Tay-Sachs and Allied Diseases Association firmly supports parents' choice to have children free of debilitating and/or terminal diseases.

SUMMARY OF ARGUMENT

Both Illinois and Pennsylvania attempt to circumvent the clear command of Roe v. Wade and, by prescribing post-viability abortion procedures which diminish women's physical health needs and ignore their mental and emotional health, prohibit such abortions altogether.

Both statutes exalt the state's interest in the potential life of the fetus over the actual lives of women seeking to terminate their pregnancies. Both statutes, in design and effect, impermissibly demean a woman's moral and intellectual decision-making role in the very rare case of post-viability abortion.

The cumulative effect of these statutes is to discourage women from choosing abortion after viability and punish those women who are not deterred. Even for women determined to exercise their constitutional rights, the statutes create a climate of fear and uncertainty within the medical profession which will deter doctors from providing such abortions and achieve the unconstitutional goal not by prohibiting of abortion after viability in haec verba, but by ensuring that the medical community does not make them available to women.

INTRODUCTORY STATEMENT

Reproductive autonomy is at the core of personal freedom. Without it, guarantees of equality are illusory. Women who cannot control when and how many children they will bring into this world cannot participate as free and equal

people in family, social, political, and economic life.

Cognizant of the importance to women of the right to choose abortion, this Court has, for more than a decade, held "that the right of privacy grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy." Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419 (1983), citing Roe v. Wade, 410 U.S. 113 (1973). In so doing, the Court recognized that the right to choose abortion, like the right not to be subjected to involuntary sterilization, Skinner v. Oklahoma, 316 U.S. 535 (1942), is a fundamental aspect of the basic civil right to reproductive autonomy. Since Roe v. Wade, this Court has repeatedly upheld the right to abortion in the face of numerous legislative attempts to

subvert it. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976);Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979). Only two years ago, this Court, in Akron, firmly rejected the suggestion that these cases were wrongly decided and explicitly reaffirmed Roe v. Wade.

Nevertheless, this Court is again being asked both to abandon principles of stare decisis and to deny women the fundamental right of reproductive autonomy that it has enunciated and protected for more than a decade. The Solicitor General argues that this Court should not respect the right to choose abortion because neither the text of the Fourteenth Amendment nor its history explicitly mentions abortion. Brief for the United States as Amicus Curiae in Support of Appellants at 23-30. It is absurd to

contend that, because the drafters of the Fourteenth Amendment were not specifically occupied with the question of abortion, this Court cannot now guarantee the right of procreative choice.

Akron made clear that "the history of this Court's constitutional adjudication leaves no doubt that 'the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the specific guarantees elsewhere provided in the Constitution.'" 462 U.S. at 426-27, quoting Poe v. Ullman, 367 U.S. 497, 543 (1961)(Harlan, J., dissenting). The absence of conclusive evidence of the Amendment's intended effect on access to an important civil right should not determine the outcome here any more than it did in Brown v. Board of Education, 347 U.S. 483 (1954). In this case, as in Brown, "we cannot

turn the clock back to 1868 when the Amendment was adopted." Id. at 492.

It is not surprising that the right to abortion was not addressed in 1868. As the Roe Court was well aware, abortion was a legally permitted option for women well into the 19th century, 410 U.S. at 141, and, as historians tell us, it was an accepted practice well after restrictive legislation was enacted.[2] Focusing instead on the problems brought about by

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[2] See, e.g., The Human Life Bill: Hearings before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, on S. 157, A Bill to Provide that Human Life Shall Be Deemed to Exist from Conception, 97th Congress, 1st Sess. 437-38. (Statement of Dr. Carl Degler, Margaret Byrne Professor of American History, Stanford University). One important reason why anti-abortion measures enacted in the 1860's and 1870's failed to alter official practice was the continuing tolerance of the practice shown by state and local courts in abortion cases. The shift in judicial attitude toward abortion did not begin until the 1880's. J. Mohr, Abortion in America 230 (1978).

the recently concluded Civil War, the framers of the Fourteenth Amendment concentrated on the overriding national issue of guaranteeing rights to the newly emancipated slaves. Thus, for many groups and for women in particular, the war-time Amendments were initially of little assistance in their struggle for basic civil rights. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1873).

Developments in law and society, however, have poured additional meaning into the broad guarantees of the Fourteenth Amendment. Accordingly, in recent years, the Court has repeatedly held that the Fourteenth Amendment guarantees women an opportunity to participate fully in society, no longer relegating them to the domestic sphere of childbearing and

childrearing, see e.g., Reed v. Reed, 404 U.S. 71 (1971) Frontiero v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975), just as it now affords both women and men reproductive autonomy.

The recognition of the abortion right evolved out of a steady and growing acceptance of a right of personal privacy extending to family matters including childrearing, procreation, and marriage. See e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Skinner v. Oklahoma, 316 U.S. 535 (1942); Prince v. Massachusetts, 321 U.S. 158 (1944); Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Eisenstadt v. Baird, 405 U.S.438 (1972).[3]

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[3]As this Court recognized in Roe,
(Footnote Continued)

The right to abortion also has close connections with the values embodied in the Thirteenth Amendment, which prohibits all slavery and involuntary servitude, "irrespective of the manner or authority by which it is created." Clyatt v. United States, 197 U.S. 207, 25 S.Ct. 429, 430 (1905). "While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons..." Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 146, 151 (1911). By forbidding coerced service, it guarantees to all people the right to consent to labor.

(Footnote Continued)
the right to abortion is also closely connected to the common law immunity given to control of one's body. Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891). 410 U.S. at 152. This common law right was given constitutional significance in Terry v. Ohio, 392 U.S. 1 (1968).

Pregnancy and the labor of childbirth are work of the most intimate continuous kind. Pregnancy and childbirth involve vast physical changes in a woman's body and potentially severe pain and discomfort. They involve degrees of risk to life and health from the very serious to the relatively minor. Women undertake voluntary pregnancies cognizant of these risks and burdens. When chosen, when a child is desired, pregnancy may be hard but nonetheless a labor of love. When forced, pregnancy is an intolerable, dehumanizing form of servitude. The right to choose abortion, because it is essential to guarantee women's consent to this labor, is deeply rooted in the core value of the Thirteenth Amendment.

The abortion right, then, is tied both to the Fourteenth Amendment's concept of personal liberty and the Thirteenth Amendment's charter of freedom

from the degradation of forced labor. So rooted, so crucial to women, and so recently reaffirmed, it is a right that must again be respected.

I. BOTH ILLINOIS AND PENNSYLVANIA IMPERMISSIBLY ELEVATE THE STATE INTEREST IN THE POTENTIAL LIFE OF THE FETUS ABOVE WOMEN'S RIGHTS TO LIFE, HEALTH AND PRIVACY IN AN ATTEMPT TO DETER AND PUNISH ABORTIONS LATE IN PREGNANCY

The Illinois and Pennsylvania statutes before the Court on these appeals contain a variety of unconstitutional provisions restricting abortion. Of particular concern to amici are those which sacrifice women's health--physical and emotional--to the purportedly viable fetus.[4] These are the latest in a long

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[4] Amici, although limiting this brief to the viability-related issues, urge affirmance of the judgments of the Courts of Appeals for the Third and Seventh Circuits striking down all Pennsylvania

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line of local laws which attempt to distort this Court's holding in Roe v. Wade that a state's compelling interest in the potential life of the viable fetus can justify laws restricting abortion only if those laws do not jeopardize women's lives or health.

The Pennsylvania Abortion Control Act mandates that doctors terminating pregnancies after viability employ the abortion procedure most likely to result in a live birth unless such procedure "present[s] a significantly greater medical risk" to the woman. Pennsylvania explicitly excludes "the psychological or emotional impact on the mother of the unborn child's survival" from the comparative risk determination. 19 Pa. Cons. Stat. Ann. 3210(b) (Purdon 1983).

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and Illinois provisions burdening the right to choose abortion.

The Illinois statutory scheme permits no consideration of women's life or health in selecting the procedure for post-viability abortions. Ill. Rev. Stat. ch. 38 ¶¶81-26(1),(4) (1983).[5] A physician is excused from a primary duty to preserve fetal life if it "would increase medical risk" to the woman only after the procedure is underway. Id. ¶81-26(5).

These provisions affect very few abortions--less than one percent of all abortions performed.[6] These few late

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[5]Section 6(1) of the Illinois statute appears to unconstitutionally proscribe all post-viability abortions. See Point II,A, infra.

[6]Ninety-nine percent of abortions in 1981 were performed at 20 or fewer weeks gestation (LMP), Grimes, Second Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 264 (1984); Based on 1980 data, it has been suggested that only about 0.01% of all abortions are performed at more than 24 weeks'

(Footnote Continued)

abortions are necessarily late, chosen as they are for reasons which do not arise or are not apparent until later in pregnancy, and the need for them is grave. The statutes at issue here presume that, in this small but significant number of cases, women together with their physicians are incapable of appropriate decision-making.

A. Abortions At or After Viability Are Requested and Performed for Compelling Physical and/or Mental Health Reasons.

A variety of circumstances compel women to choose abortion late in

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gestation. Henshaw, Binkin, Blaine, Smith, A Portrait of American Women Who Obtain Abortions, 17 Family Planning Perspectives 90, 91 (1985). As shown infra Point II,C, a substantial proportion of this small number of late abortions are performed on women carrying non-viable fetuses. Fetal survival at less than 24 weeks gestation and 600 grams has not been reliably documented. Id.

pregnancy. One circumstance, noted by the Court in Colautti, is the discovery of severe, even fatal, fetal defects. The safest current method of detecting genetic defects is amniocentesis, a test which must be performed well into the second trimester of pregnancy, with results seldom being available before the 19th week of pregnancy.

Were it not for such option of late abortion, many women would choose to abort healthy pregnancies early, for fear that the fetus would be severely defective. Only the possibility of late abortions permits these women to have healthy, wanted children.[7]

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[7]The overwhelming majority of tests for fetal abnormalities are negative, allowing the woman to continue the pregnancy without that anxiety. Simpson and Verp, Prenatal Diagnosis of Genetic Disorders, Principles of Obstetrics, 130-32 (R. Caplan ed. 1982); Caplan,

(Footnote Continued)

The problems of giving birth to a child with a severe genetic defect are many and profound. The mother of a child with Tay-Sachs disease put it succinctly: "Once you've had a child with Tay-Sachs, you can't bring another into the world." "Breakthroughs in Prenatal Testing Give Hope to High-Risk Couples," Wall Street Journal, July 22, 1985, p. 21. For a moving account of the tragedy of Tay-Sachs, see, M. Silver, "Life After Tay Sachs," 99 Jewish Monthly, A Publication of B'nai B'rith, No. 10, pp. 14 et seq. (June-July, 1985).

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Antenatal Care, Principles of Obstetrics, 104 (R. Caplan ed. 1982). This testing process has been estimated to result in abortions in only two to five per cent of the 75,000 or so cases of diagnostic amniocentesis annually. Grimes, Second-Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 261 (1984). This is a tiny percentage of all abortions, but it is a critical one.

One study of parents of children with cystic fibrosis reveals the parents' perceptions.

> ...one mother, who had lost a first-born son, said: 'I often wish he hadn't been born -- for he didn't ask to be born, and if I'd known or thought we would pass on this disease, he'd never have been born.' One mother, who said she had not been told the disease was inherited until she had lost three children, commented: 'If I had known I wouldn't have had any more. It does make me feel guilty having so many. I think it's because they've suffered -- they definitely must suffer having their lungs affected.'

L. Burton, The Family Life of Sick Children 213 (1975).

These problems have a devastating effect on the woman and her family. A woman may not have the psychological or financial resources or the physical energy to cope with a severely damaged child. She may already be caring for other children or a disabled family member. If she gives birth to a child with a birth or congenital defect who requires

constant care, she will be forced to concentrate her energies on the care of the newborn to the detriment of other children or family members, or to give up financially vital employment. Thus, women's health often necessitates an abortion in these tragic circumstances.

Other circumstances requiring late abortions include the sudden or suddenly critical illness of the woman later in pregnancy. Conditions such as pre-eclampsia, diabetes, heart disease, cancer, high blood pressure and kidney disease, either arise or worsen later in pregnancy and necessitate abortions at or after viability--often on an emergency basis.[8] Further, young and poor women,

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[8] See generally, F. Arias, ed., High-Risk Pregnancy and Delivery (1984); See also, Knight and Arias, Third Trimester Bleeding, Id. at 287; Arias, Hypertension During Pregnancy, Id. at 100.

who do not have ready access to health care, delay obtaining abortions necessary to preserve their lives and health because they are unaware of their availability or unable to raise the funds necessary to secure them. The very young and the very poor are the women to whom pregnancy presents the greatest health risk.[9]

When the need for abortion does not arise or become known until late in pregnancy, time is needed to make the decision and, if the decision is to abort, the relative unavailability of

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[9] In 1981, more than one third of all post-first-trimester abortions were obtained by women under the age of 20. Grimes, Second-Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 262 (1984); Alan Guttmacher Institute, Teenage Pregnancy: The Problem That Won't Go Away (1981); Singh, Torres, and Forrest, "The Need For Pre-Natal Care in the U.S.: Evidence From The 1980 Natality Survey," 17 Family Planning Perspectives 118 (1985).

late abortion procedures results in additional delay.[10] In extreme cases, these women may be at the brink of viability when they are finally able to obtain abortions.

If a woman decides to continue a life or health-threatening pregnancy, she cannot be told that the state has concluded that it is not worth the risk. Similarly, a woman who opts for abortion cannot be forced by the state to risk a birth.

B. The Statutory Schemes Compel Disastrous Outcomes.

Both statutes also preclude consideration of the terrible suffering that

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[10] Only a miniscule percent of all abortion providers offer procedures late in pregnancy and it is difficult and time-consuming to locate an appropriate facility. Alan Guttmacher Institute, Public Policy Issue in Brief, February 1983, at 3.

accompanies attempts to produce live births. The statutory language gives the impression that living, healthy infants will be produced. In fact, that result is unlikely. Virtually all of the very few infants born alive from the statutorily mandated procedures would be of extremely low birth weight (1000 grams or less).[11] One recent study showed that fewer than half of all such babies survived to leave the hospital. Most of the deaths occurred within the first month. The lower the birth weight, the worse the chances for survival: more than

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[11] The measurements of development in utero and after birth differ, and are not simple to reconcile. Gestational age is the crucial measure in utero; weight is more widely used after birth. Moreover, "the most important information that an obstetrician requires prior to the interruption of a compromised pregnancy is the status of the fetal lung..." Hobbing, A technical approach to uncertain dates, Perinatal Intensive Care 123, 126 (S. Aladjem and A. Brown eds. 1977).

97% of the infants 501-600 grams died; about 70% of those of 601-700 grams and almost 30% of those of 901-1000 grams died. Saigal, Rosenbaum, Stoskopf, Sinclair, Outcome in infants 501 to 1000 gm birth weight delivered to residents of the McMaster Health Region, 105 J. Pediatrics 969, 974 (1984). Of the infants who had survived through the study period, about half had handicapping conditions the researchers classified as either "major" or "moderate." Id. See also Hirata, Epcar, Walsh, Mednick, Harris, McGinnis, Sehring, Papedo, Survival and outcome of infants 501 to 750 gm: A six-year experience, 102 J. Pediatrics 741 (1983) (60% of such infants in newborn intensive care units died; of the survivors, all were below fiftieth percentile in growth by age 3; one-third were of borderline or lower

intelligence by age 4; 8% died after discharge from hospital).

These outcomes, and the measures required to attain even them, are far from costless for the mother. The anxiety, alienation, disruption to the family and grief of having an infant die or spend months in intensive care (and then probably die) are staggering. See Stinson, The Long Dying of Baby Andrew (1983); Siegel, Gardner, Merenstein, Families in crisis: theoretical and practical considerations in Handbook of Neonatal Intensive Care 421 (G. Merenstein and S. Gardner eds. 1985); Gardner and Merenstein, Grief and Perinatal Loss in id 449. So are the financial costs. Moreover, years of special care are likely to be required if the child survives.

A woman may, of course, freely choose to take these risks.[12] When she has considered and decided not to take them, however, the state is not permitted to override her choice in practice, while appearing to honor it in theory.

The suffering is not obviated by the possibility that a woman may put up her "aborted alive" child for adoption. Many children in that situation will be considered too much at risk to be adoptable. See Stinson, supra. The woman's life will in any event have been drastically changed by the pregnancy and birth. The problems of giving up a child for adoption are particularly acute for

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[12] Women who want to carry to term fetuses with severe defects or life-threatening conditions and rear their disabled children are entitled to the resources and societal support necessary to assure the best possible life prospects.

women because they bear a disproportionate burden of responsibility for children, as well as all the stress of childbirth. Among the psychological burdens of forced childbearing followed by adoption is debilitating anguish over having abdicated responsibility for a child, regardless of the woman's actual ability to fulfill such responsibility had she kept the child. Furthermore, familial and social ostracism may result if the relinquishment is perceived as an abandonment of the child. See, e.g., B. Lifton, Lost and Found: The Adoption Experience 207-27 (1979); Regan, Rewriting Roe v. Wade, 77 Mich L. Rev. 1569, 1589 (1979); Kilibanoff, Genealogical Information in Adoption, 11 Family Law Quarterly 185, 195 (1977).[13]

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[13]In a study of thirty-eight birth parents who have given up children to

(Footnote Continued)

C. The Statutes Disregard Women's Health.

The statutory language attempts to create an illusion of fairness by balancing "the life and health of any unborn child" against "the life or health of the pregnant woman." Roe makes clear, however, that the life and health of a pregnant woman outweigh the state's interest in the potential life of the viable fetus. Moreover, the statute in fact impermissibly weights the balance in favor of the state's protection of fetal

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adoption between one and thirty-three years before the survey, it was found that "[e]ven if the birth parents had become comfortable with the decision because there were no viable alternatives they nevertheless felt loss, pain, mourning, and a continuing sense of caring for that long vanished child." A. Sorosky, A. Baran, & R. Pannor, The Adoption Triangle 72 (1978). The authors liken relinquishment to a psychological amputation," and present the letters of birth parents expressing their inability to resolve their feelings or forget the children they gave up. Id. at 47-72.

potential. The provision applies only to physical health, without any extraneous female "emotional" factors.[14] Far from being a humane accommodation between competing interests, it reduces a woman to mere physicality. The prohibition on consideration of mental health says that a woman is only a maternal machine that is entitled to be saved from gross

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[14] Indeed, by requiring women to bear "significantly greater medical risk," the Pennsylvania statute even requires women to sacrifice their physical health and possibly their lives in the service of a viable fetus. This demand is clearly foreclosed by this Court's precedents. Roe identified the State's compelling interest in the potential life of the fetus at viability, but made clear that its force stopped at the point of "the life or health of the mother." 410 U.S. at 163-64. The Court of Appeals held that the State can not force doctors to weigh the degree of increased danger to a woman's health against a possible benefit to a viable fetus. A.C.O.G. v. Thornburgh, 737 F.2d at 283, 300 (1984), citing Colautti v. Franklin, 439 U.S. at 400. Any increased danger to the woman overrides the State's interest in fetal potential.

physical damage; she is not a person whose life and future matter.

The artificial definition of "health" is unconstitutionally restrictive. This Court has long recognized that "health" is a complex of factors, "physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient." Doe v. Bolton, 410 U.S. at 192. See also United States v. Vuitch, 402 U.S. 62, 72 (1971). Such an attempt to legislate women's psychological well-being out of existence violates the constitutional mandate of Roe and Doe.

These statutes are unlike the requirement upheld in Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983), that a second doctor attend post-viability abortions. The Missouri provision at issue in Ashcroft protected a baby--a person--

born alive after an abortion procedure. It did not compel an abortion method designed to trigger the need for a second doctor.[15] Here, the states assert their interest in the potential life of a fetus still in utero and seek to compel its actualization with little, if any, regard for the health of the pregnant woman.[16]

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[15]Another provision in the Missouri statute, not before the Court in Ashcroft, did forbid "the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman." 462 U.S. at 483. However, that provision did not, unlike the statutes before the Court on this appeal, constrict the definition of health or prevent a woman, in consultation with her physician, from basing her choice of post-viability procedure on all the aspects of her health recognized in Doe v. Bolton. See Planned Parenthood Asso. of Kansas City v. Ashcroft, 655 F.2d 848, 862-63 (8th Cir. 1981).

[16]In Ashcroft, Justice Powell, reviewing the testimony of a single abortion provider, noted that the record in that case lacked an explanation of "the circumstances when there were

(Footnote Continued)

The solicitude for fetal potential, as expressed in these provisions, exceeds a state's constitutional powers and invades women's constitutional rights. The statutes turn Roe on its head, preferring the potentiality of fetal life to the reality of women's lives, and refusing to recognize women as "persons in the whole sense." 410 U.S. at 162.

D. The Statutes Cruelly Punish Women Who Choose Abortion.

Inherent on the face of the Pennsylvania statute and in the Illinois scheme, is a wholly false distinction

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(Footnote Continued)
'contraindications' against the use of any of the procedures that could preserve viability. . ." 462 U.S. at 483-85, n. 7. The question, however, is not one of provider preference. It is a grave matter of women's total health needs--including mental health, emotional and familial considerations. After all, it is the woman, in consultation with her physician, who makes the choice of procedure, not the physician alone based on his or her convenience or personal views.

between the "psychological and emotional impact . . . of the unborn child's survival" and the mental health reasons for which a woman sought the abortion in the first place. This Court in Roe recognized the importance of the woman's health by limiting the state's power to prohibit post-viability abortions to those cases not jeopardizing women's health. The Pennsylvania statute purports to adhere to Roe by incorporating preservation of the woman's life or health as a reason for abortion in §3210(a). Yet it completely undercuts women's health in §3210(b), which says that, although the health impact of bearing a child can be the basis for an abortion, the state can force a woman to live with exactly the detrimental consequences the abortion was supposed to forestall. This is as cruel as it is absurd.

In addition, the process of forced birth and subsequent surrender have further consequences. A woman, having given birth to a child, must go through the rest of her life with the child's well-being as an unanswered and unanswerable question. Is the child with a loving family? Has the child been left, neglected, in an inferior institution? Has the child received a proper education? In our society, giving birth means having a host of social and emotional connections to the child, even if the birth was unwanted and coerced. These statutes foist those connections, and the difficulty and pain of dealing with them, on women who have considered and rejected them.

Nor would the unconstitutional impact of the statutes be ameliorated in the event that techniques ever improved sufficiently to save almost all extremely

low birth weight infants and afford them a reasonably good prognosis.[17] The state's command to women to produce babies can not be reconciled with the fundamental rights of autonomy and bodily integrity that are part of the constitutional guarantee of privacy. These statutes represent a state choice for reproductive compulsion, a choice can not be made consistent with our Constitution. Cf. A. Huxley, Brave New World (1939).

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[17]The time required for the development of the human lung sets a lower limit on the possibilities of neonatal survival. See experts quoted in Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1024 (1984). See also n. 11, supra.

E. The Statutes Inhibit and Deter Women From Making Reproductive Choices.

These provisions have indirect effects that are as pernicious, and unconstitutional, as their direct effects. By mandating the use of abortion methods that could result in a live birth, the state forces a woman to run the risk of giving birth, very prematurely, to a child who has little chance for a healthy life--when what she has decided on is an abortion, not a birth. Faced with this state-imposed risk, women may very well "choose" to forego the abortion. They will opt to carry their pregnancies as close to term as their health will permit. A woman compelled to have the child she would have chosen not to have may sacrifice her own life and health--and the well being of the rest of her family--to improve the quality of the life of the new child. Women do not want

their children to die, or lead painful and constricted lives. That is often why they choose abortion. If the state forces childbirth upon them when they would have chosen abortion, many women will act to assure the best possible outcome at birth. This Court should not mistake their humane reaction to a state compelled dilemma for a willing surrender of the right to an abortion.

Paradoxically, the statutes also deter women from choosing childbirth in many cases. By forcing women to face the prospect of live births of fetuses diagnosed to be fatally or severely defective, the statutes act to foreclose not only an option for abortion, but an option for birth. See Point I,A, supra. This Court has, since Skinner v. Oklahoma, made clear that the state can not interfere with the reproductive potential of individuals. Women for whom

amniocentesis holds the possibility of childbearing without fear of disaster should not be deprived by the states' rigidity about abortion of their opportunity to bear healthy children.

II. THE STATUTES UNCONSTITUTIONALLY RESTRICT WOMEN'S ACCESS TO ABORTION BY IMPERMISSIBLY RESTRICTING THE ABILITY OF DOCTORS TO EXERCISE THEIR MEDICAL JUDGMENT.

Although appellant-intervenor Diamond[18] characterizes the Illinois regulation of post-viability abortions at issue here as an innocuous effort that "merely regulates the manner in which the physician may perform a post-viable abortion," Brief for Appellants at 37, in reality, the statutes erect a genuine obstacle for women in the form of

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[18] Illinois has not appealed to this Court and Williams, the only other intervenor below, has since died.

criminal sanctions for their doctors. These restrictions have an obvious, direct effect on women, who will not be able to find doctors willing to take the risks imposed on them.

A. Requiring a Physician Performing an Abortion to Treat a Fetus as Though it Were Being Born Alive is Unconstitutional.

Section 6(1)[19] of the Illinois law purports to impose the same standard of

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[19] No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a

(Footnote Continued)

care on a physician "who intentionally terminates a pregnancy" post-viability as on a physician attending a live birth. Read literally, this would seem to prohibit the abortion, since the only way to meet this standard of care is to terminate the pregnancy as though a live birth were the desired outcome. This involves a very different course of medical treatment than would be

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(Footnote Continued)
viable fetus or infant results from such a failure.

The Court of Appeals noted that, in June, 1984, §6(1) was "substantially transformed" by amendment. 749 F.2d at 455. Amici therefore suggest that, although the Court of Appeals properly invalidated this provision, the issue is now moot. It is the current statute which governs the availability of abortions in Illinois. No woman could now be affected by the version of §6(1) considered by the Court of Appeals.

In the event that the Court determines that there is still a live controversy as to the decision of the Court of Appeals on §6(1), amici urge affirmance for the reasons here.

undertaken if a live birth were not the outcome sought. For example, in the case of a woman exhibiting placenta previa with moderate bleeding, either an abortion or an attempt to continue the pregnancy could be indicated, depending on the circumstances. If a woman elected to continue the pregnancy, she could be hospitalized for weeks, then undergo a Cesarian section.[20] Knight and Arias, Third Trimester Bleeding, in High-Risk Pregnancy and Delivery 285-87 (F. Arias ed. 1984).

If a woman elects to have an abortion, it should be performed immediately, not after an unnecessary and dangerous delay. Section 6(1) might well

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[20]For an account by parents of the agonizing death of a child born after doctors advised against an abortion in such a situation, see R. Stinson and P. Stinson, The Long Dying of Baby Andrew (1983).

require a woman whose health is threatened by continuation of the pregnancy to go to the brink of death before an abortion could be performed. Under Roe, as reaffirmed by Colautti, the health interest of the woman can not be disregarded until it has reached the point of being acutely life-threatening. The statute, therefore, is plainly invalid at this literal level.

Appellants, however, contend that §6(1) "requires that fetal protection measures be taken during the course of the abortion performed after viability." Brief for Appellants at 31. This reading makes the statute unconstitutionally vague. Since literal compliance is both medically and legally impossible, what is left is a statute requiring physicians to take "fetal protection measures." What are such measures? How heroically must they be pursued? At what

point will such measures impinge on the woman's health, and how will a physician know what to do then? In sum, it is completely unclear what the physician's duty of care could possibly be, or how it could be carried out.

Section 6(1) further imposes liability on doctors for conduct with respect to a fetus "known to be viable." The statute does not specify how or under what standards the knowledge is to be evaluated, or by whom. There are crucial omissions, rendering the statute unconstitutionally vague.

There is no consensus in the medical community about how great the chance for survival must be in order for a fetus to be considered viable.[21] There is also

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[21] Colautti at 388-89 quotes two physicians who gave different percentage figures and one who refused to use a

(Footnote Continued)

disagreement as to what variables should be accorded greatest weight.[22] As this Court has recognized,

> [t]he prospect of such disagreement, in conjunction with a statute imposing strict . . . criminal liability for an erroneous determination of viability could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

Colautti, 439 U.S. at 397.

Because the ascertainment of viability is dependent on many variables, viability determinations also may be

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(Footnote Continued)
fixed percentage. See also Roe, 410 U.S. at 159.

[22] Compare Williams Obstetrics 173 (J. Pritchard & E. MacDonald 16th ed. 1980), (favoring fetal age as the most reliable determinant of chance for survival ex utero) with Williams, et. al., Fetal Growth and Perinatal Viability in California, 59 Ob. Gyn. 624 (May 1982) (finding that birth weight plays a greater role than gestational age in predicting survivability).

inaccurate by as much as several weeks.[23] Even the most advanced instruments for assessing fetal age have a five-day margin of error, and this margin is greater if the woman does not undergo ultrasound between the eighth and twelfth weeks of pregnancy.[24] It is simply not possible to "know" objectively that a fetus is viable. The imposition of

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[23]Grimes, supra n. 9, at 260-61.

[24]Hohler, Multiple Ultrasound Measures of Fetus More Accurate, 18 Ob. Gyn. News 50 (May 15-31, 1983). Contrary to the assumption of the Illinois statute that viability is an empirically objective fact, the viability assessments of physicians are highly subjective ones, based largely on experience: "The choice of 26, 27, 28 or any other number of weeks as the point of medical viability by experts in the field is based on experience from observing thousands of premature births and the correlation of survivals with estimated fetal age." Lenow, The Fetus as Patient: Emerging Rights as a Person, 9 Amer. J. Law & Medicine 1 (1983); see also, Bolognese and Roberts, Amniotic Fluid, in Perinatal Medicine: Management of the High Risk Fetus and Neonate 198-203 (2d ed. 1982).

criminal penalties on physicians on the basis of a presumed knowledge that is not possible to obtain and inadequate standards is clearly unconstitutional.

The central problem of lack of accepted objective standards is exacerbated by the statute's failure to specify who makes the determination that the fetus at issue is viable. This opens the physician to possible second-guessing by state law enforcement personnel or other medical personnel. That prospect is what has led this Court to hold repeatedly that "[t]he determination of whether a particular fetus is viable is, and must be, a matter for the responsible attending physician." Planned Parenthood v. Danforth, 428 U.S. at 64, cited in Charles v. Daley, 749 F.2d at 459. See also Colautti v. Franklin, 439 U.S. at 396-97. The statute unconstitutionally leaves the physician in doubt on this

crucial point.

B. Pennsylvania's Attempt to Create a Balance Between Fetal Viability and Risk to Women is Unconstitutionally Vague.

Section 3210(b) of the Pennsylvania statute requires physicians to choose a post-viability abortion method "which would provide the best opportunity for the unborn child to be aborted alive" unless the use of that method would pose a "significantly greater" risk to the woman. This section is impermissibly vague because it forces physicians to combine their estimate of viability and their estimate of "significantly greater" risk to women, then attempt to balance them, and threatens criminal penalties if they strike a balance that the State does not like. As noted in Section II.A, supra, viability is itself an estimate. Colautti, 439 U.S. at 395-96. Viability estimates vary widely from case to case

and from physician to physician. Colautti, 439 U.S. at 396, and n. 14.

Compounding the uncertainty inherent in the viability determination is the requirement that physicians assess the significance of the increased risk to the woman. In what respect must a risk be "significantly greater?" Physicians are then required to compare their estimates of the magnitude of benefit to the fetus with their estimates of the magnitude of harm to the woman. This Court's conclusion about an earlier attempt by Pennslyvania in this area is equally applicable to §3210(b): "The State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." Colautti, 439 U.S. at 401.

C. Reporting Requirements That Focus on a Physician's Determination of Viability Endanger Women and Unconstitutionally Chill Physicians

Section 3211 of the Pennsylvania statute requires a physician to

> determine whether, in his good faith judgment, the child is viable. When a physician has determined that a child is viable, he shall report the basis for his determination that the abortion is necessary to preserve maternal life or health. When a physician has determined that a child is not viable, he shall report the basis for such determination.

The Court of Appeals held that this requirement was unduly burdensome and furthered no compelling interest at the pre-viability stages. 737 F.2d at 301. Moreover, the requirement of reporting the basis for determining that "a child is not viable" creates an unnecessary and unconstitutional pressure on doctors.

The very language of the provision tells physicians that the state sees the fetus as a person ("a child"), contrary

to medical reality and the mandate of Roe. This attitude can only lead physicians to err on the side of the fetus in exercising their professional judgment, to the detriment of the woman and her rights.

The reporting requirements further impermissibly introduce the possibility of conflict between physicians' reporting duties and their medical judgment and responsibility to their patients. Deciding whether a fetus is viable in a marginal case is not, however, a simple or rapid process.[25] In some circumstances of urgent medical necessity, termination of pregnancy must be undertaken almost as soon as the

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[25]Experts recommend both ultrasound and amniocentesis. Knight and Arias Third Trimester Bleeding, in High-Risk Pregnancy and Delivery 287(F. Arias ed. 1984).

precipitating medical condition has been discovered.[26]

The reporting requirement compounds the disruption of the physician's judgment and practice begun by the viability focus of §3210(b). Should the physician take the time to make a full-scale viability determination that will satisfy the unknown persons who will later read the report at leisure? Even wondering about what to do can take valuable time in an emergency. The lack of direction to the physician about how to comply with this section, as well as the absence of an emergency exception to the requirements, render these provisions invalid.

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[26] E.g., placenta previa with severe hemorrhage, severe preeclampsia, carcinoma of the cervix. See n. 8, supra.

Under both the Illinois and the Pennsylvania statutory schemes, the fear of incurring criminal liability will induce doctors to err on the side of finding viability whenever the slightest chance of inaccuracy exists and to refuse to perform needed abortions. Because of the uncertainties inherent in determining viability, a large percentage of cases in which doctors are deterred from performing abortions will be of women carrying non-viable fetuses. The implementation of these statutes will undoubtedly result in the unconstitutional denial of abortions to women greatly in need of them.

D. The Statutes Straitjacket Doctors by Compelling Them to Convey Medically Inaccurate Information to Women Seeking Abortions.

Both the Illinois and Pennsylvania statutes require doctors to respond in a rigid, mechanical, and predetermined way when they attend patients seeking

abortions at or near viability. The statutes greatly circumscribe the exercise of physicians' medical judgment and distort the process of abortion care. By forcing doctors to inform their patients of an obligation to try to salvage the fetus, the statutes force them to perpetrate a cruel deception on pregnant women.

This is most pointedly the case with respect to Illinois §6(4), which has introduced an idea that can only be expressed as that of a "possibly viable" fetus.[27] This is simultaneously

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[27] No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of

(Footnote Continued)

redundant and confusing. Viability incorporates, by definition, a calculation of possibility.[28] A statutory scheme based on a possible possibility can not help physicians give women sound advice, especially since a pre-viable fetus will, by definition, die before or shortly after birth. Nor can it be a basis for criminal liability.[29]

(Footnote Continued)

> the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of more than momentary survival of the fetus, apart from the body of the mother, with or without artificial support.

(emphasis added).

[28] Williams Obstetrics 587 (J. Pritchard & E. MacDonald, 16th ed. 1980) defines viability as a concept "widely used to identify a reasonable potential for subsequent survival if the fetus were to be removed from the uterus." (emphasis added).

[29] Illinois's perception of viability in §6(4) is so loose that it might even

(Footnote Continued)

In addition, Illinois §6(1) and Pennsylvania §3210(b), by creating criminal liability based on the physician's viability determination, distort the process of medical judgment. Even without the influence of the statutes, fetuses are wrongly deemed to be viable and die shortly after birth. The statutes, however, require physicians to act as though there are no marginal cases and

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(Footnote Continued)
justify an argument that the conceptus at any point is a "possibly viable" fetus, since in some sense it can survive for more than a moment outside the body of the woman, albeit with artificial support. Moreover, the phenomena of cloning, parthenogenesis and chimerism, demonstrate that the human zygote is not unique in its capacity to develop into an organisism. "If it is argued that a zygote should have the rights of personhood because it has the capacity to develop into a person, then one can also argue that an unfertilized egg should have the rights of personhood since it also may have the same capacity. Milby, The New Biology and the Question of Personhood: Implications for Abortion, 9 Amer. J.L. & Medicine 31, 32 (1983).

no countervailing factors: every fetus deemed viable must be treated in the same way, and every woman carrying such a fetus must be treated in the same way. This mandate denies to physicians the discretion and flexibility they need in order to make their best medical judgments in a difficult and sensitive area.

The statutes therefore require doctors to mislead their patients into believing that a reasonable possibility exists of giving birth to a baby able to sustain life, when, in fact, almost no possibility exists. In this way, not only do the statutes invade the privacy of the doctor-patient relationship, but they also actively encourage doctors to medically mislead pregnant women. This deception and the unnecessary grief it

will precipitate[30] cannot be overlooked in an evaluation of the statutes' unconstitutionality.

III. SECTION 6(4) OF THE ILLINOIS STATUTE IMPERMISSIBLY REGULATES ABORTIONS PRIOR TO VIABILITY IN CONTRAVENTION OF ROE v. WADE.

The Court in Roe declared, and in Colautti confirmed, the invulnerability of pre-viability abortions to state interference for any reason not related to maternal health. Roe, 410 U.S. at 154, 159, 169; Colautti, 439 U.S. at 682. Illinois, however, has tried to impose a requirement that doctors use the same standard of care in aborting a fetus which has a "possibility" of "more than momentary" survival[31] as in bringing to

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[30] See Point 1,B, supra.

[31] The statute has since been amended. The Court of Appeals did not

(Footnote Continued)

birth a truly viable fetus. This is plainly an impermissible regulation of pre-viability abortions. By its own terms, §6(4) identifies a period in pregnancy prior to viability. Because there is a parallel requirement in §6(1) which is addressed to fetuses deemed "viable," the legislature clearly intended the two sections to refer to different points in pregnancy. See Colautti v. Franklin, 439 U.S. at 393; Charles v. Daley, 749 F.2d at 460.

This intrusion into the period prior to viability is not justifiable. This Court has held that statutes purporting

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(Footnote Continued)
pass on the validity of the amended version. 749 F.2d at 452. Amici suggest that, although the Court of Appeals properly invalidated this provision, the issue is now moot. See n. 19, supra. In the event that the Court determines that there is still a live controversy as to the decision of the Court of Appeals about §6(4), amici urge affirmance for the reasons stated here.

to regulate abortions prior to viability, except on grounds of maternal health, unconstitutionally infringe upon a woman's fundamental right of privacy under the Fourteenth Amendment. Colautti v. Franklin, 439 U.S. 379, 388 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 63-64 (1976). Appellants concede, as they must, that Illinois' alleged interest in the fetus prior to viability is not compelling. Brief of Appellants at 38, 43. They offer no maternal health justification for the statute. The Court of Appeals correctly noted that §6(4) "does not seek to protect the health of the mother." 749 F.2d at 461. Therefore, it can not stand.

Although appellants attempt to salvage their position by suggesting that the pre-viability stages are subject to a "balancing" of interests (Jurisdictional Statement at 55), it is clear that the privacy right recognized in Roe would be meaningless if the right could be so abridged prior to viability. The "balance" appellants call for has already been struck. Roe v. Wade, 410 U.S. at 164-65.

CONCLUSION

The states' assertion of fetal primacy and their willingness to impose substantial and long-term hardships on women to implement that view goes well beyond constitutional bounds.

The judgments of the Court of Appeals for the Third Circuit and the Court of Appeals for the Seventh Circuit should be affirmed.

Dated: New York, N.Y.
August 30, 1985

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

RICHARD THORNBURGH, ET AL., APPELLANTS
v.
AMERICAN COLLEGE OF OBSTETRICIANS AND
GYNECOLOGISTS, ET AL.

EUGENE F. DIAMOND, ET AL., APPELLANTS
v.
ALLAN G. CHARLES, ET AL.

ON APPEAL FROM
THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND SEVENTH CIRCUITS

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE -- WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES, CALIFORNIA; CALIFORNIA WOMEN LAWYERS; THE WOMEN'S BAR ASSOCIATION OF ILLINOIS; THE FLORIDA ASSOCIATION OF WOMEN LAWYERS; FLORIDA ASSOCIATION OF WOMEN LAWYERS, DADE COUNTY CHAPTER; AND CALIFORNIA LAWYERS FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENTS AND AMICUS BRIEF

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Women Lawyers' Association of Los Angeles, California; California Women Lawyers; the Women's Bar Association of Illinois; the Florida Association of Women Lawyers; The Florida Association of Women Lawyers, Dade County Chapter; and California Lawyers for Individual Freedom respectfully move this Court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorneys for respondents and one of the appellants herein has been obtained, but the attorneys for the remaining appellant herein refused to consent to the filing of this brief.

Applicants have an interest in this case because they are organizations that have professional women

as members, that have women as clients, and that are concerned with protecting the constitutional rights of women in society. Applicants and their members are personally and professionally concerned with the importance of preserving a woman's right to decide whether to terminate a pregnancy because pregnancy may adversely affect a woman's health, her life plans, the welfare of her family, and the welfare of unwanted children.

The attached brief responds to the arguments made by the Solicitor General of the United States in his amicus brief filed in support of respondents. Applicants believe

that the Solicitor General's arguments will not be adequately addressed by the respondents. If applicants' argument is approved by this Court, the decisions of the Appellate Courts below must be affirmed.

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INTEREST OF AMICI CURIAE

Amici curiae are state or local bar organizations having as members female and male lawyers and judges who are concerned with the special problems faced by women. California Lawyers for Individual Freedom is an organization of attorneys in the San Francisco area concerned with the preservation of personal liberties under the Constitution.

Amici and their members are personally and professionally concerned with the importance of preserving a woman's right to decide

whether to terminate a pregnancy because, as this Court found in Roe v. Wade, 410 U.S. 113, 153 (1973), pregnancy may adversely affect a woman's health, her life plans, the welfare of her family, and the welfare of an unwanted child. Amici therefore submit this brief in response to the amicus curiae brief submitted by the Solicitor General of the United States.

SUMMARY OF ARGUMENT

The Solicitor General's argument that there is no fundamental constitutional right to choose whether to terminate a pregnancy is

untenable and unfounded. The doctrine of stare decisis requires reaffirmance of the holding in Roe v. Wade, which recognized that right. The right to choose to terminate a pregnancy is a fundamental right concerning a private decision about family matters that is clearly protected by the Due Process Clause of the Fourteenth Amendment. It is a well-established principle of constitutional law that any state regulation of such a fundamental right is subject to strict scrutiny and must be justified by a compelling state interest where the regulation impinges on the individual's right. In applying this test, the

state interest must be defined in a way that does not violate the Establishment Clause of the First Amendment. Finally, public policy and opinion support the Court's continued recognition of the constitutional right to reproductive choice.

ARGUMENT

I. INTRODUCTION.

In an amicus curiae brief in this action, the Solicitor General has urged this Court to overturn its decision in Roe v. Wade, 410 U.S. 113 (1973), holding that a woman has a fundamental right to decide whether to terminate a pregnancy, and, by

implication, the score of its decisions which have accepted and applied Roe v. Wade.

Only two years ago the Court reviewed and explicitly reaffirmed Roe v. Wade in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). In fact, in Akron the Court not only approved Roe v. Wade, but also clearly reaffirmed that a woman's right to choose whether to terminate a pregnancy is a fundamental constitutional right and, therefore, any state regulation of it is subject to strict scrutiny.

The Solicitor General would take away a woman's right to

choose whether to terminate her pregnancy and instead interject governmental control into our most personal and private decisions. Adoption of the Solicitor General's position would result in a return to the days of unsafe, illegal abortions for women unable to endure a harmful or unwanted pregnancy.

Amici curiae believe that every person has a constitutional right to be free from the intrusion of the government into his or her most intimate personal decisions, and that this right clearly encompasses a woman's right to choose what will happen to her own body and, indeed, her own life. In this

brief, amici curiae will demonstrate that the decisions in Roe v. Wade and Akron should be reaffirmed not only on the basis of stare decisis, but also on the ground that they were correctly decided in the first instance. Amici urge the Court to once again reaffirm what has become a long line of decisions recognizing and protecting a woman's right to reproductive choice.

II. STARE DECISIS REQUIRES THAT ROE V. WADE BE REAFFIRMED.

The Solicitor General urges the Court to ignore the doctrine of stare decisis as applied to a woman's well-recognized constitu-

tional right to decide whether to terminate her pregnancy. This position underrates the strength and significance of the doctrine of stare decisis, particularly as applied to this Court's decision in Roe v. Wade.

A. Reaffirmance of Roe v. Wade Will Promote Stability, Judicial Efficiency and Public Faith in the Judicial System.

This Court has explained the purpose and importance of the doctrine of stare decisis by saying:

> "Very weighty considerations underlie the principle that Courts should not lightly overrule past decisions.

> Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970).

In light of these guidelines, this Court's determination to respect stare decisis by reaffirming Roe v. Wade barely two years ago in Akron has special significance for the present case. In Akron, as here, this Court was asked to overrule its decision in Roe v. Wade on the asserted ground that the Court had erred in interpreting the Constitution. 462 U.S. at 419. In rejecting that request and reaffirming Roe v. Wade, this Court recognized "especially compelling reasons for adhering to stare decisis in applying the principles of Roe v. Wade."

First, Roe v. Wade was carefully considered and was decided only after twice being argued and extensively briefed. Second, Roe v. Wade was decided by seven justices, including the Chief Justice. Third, since Roe v. Wade was decided, the Court has repeatedly and consistently accepted and applied its basic principle that a woman has a fundamental right to make the highly personal choice whether to terminate her pregnancy. 462 U.S. at 420 n.1.[1]

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1 Roe v. Wade has been extensively relied upon not only by this Court but also by the lower federal (Continued)

As a result of this Court's consistent action and as a matter of personal conviction, most Americans believe that a woman should have a right to make that decision.[2] Were the Court to withdraw its long standing recognition of that constitutional right, the ability of all citizens to rely on this Court's decisions as a guide to their conduct would be seriously undermined. That uncer-

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courts and by the courts of the various states. For example, Shepard's United States Citations through July of 1985 contains more than five pages of judicial citations to the decision.

2 See infra at V.

tainty will be avoided and the interests of stability, judicial efficiency, and public faith in the judicial system will be served if the Court adheres to stare decisis and once again reaffirms Roe v. Wade.

B. The Solicitor General Fails to Meet The Heavy Burden Necessary To Overrule Roe v. Wade.

Because of the important policies behind the doctrine of stare decisis, a litigant who asks this Court to disavow one of its precedents bears a heavy burden. As the Court stated in Thomas v.

Washington Gas Light Co., 448 U.S. 261, 272, (1980):

> "That doctrine [of stare decisis] not only plays an important role in orderly adjudication; it also serves the broader societal interests in evenhanded, consistent and predictable application of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force." (footnotes omitted).

Acknowledging the continued viability of this holding, this Court recently repeated warnings that even in constitutional cases,

"any departure from the doctrine of stare decisis demands special justification." Garcia v. San Antonio Metropolitan Transit Authority, _____ U.S. _____, 83 L.Ed.2d 1016, 1039, 105 S.Ct. 1005 (1985) (Powell, J., dissenting); Arizona v. Rumsey, _____ U.S. _____, 81 L.Ed.2d 164, 172, 104 S.Ct. 2305 (1984); Oregon v. Kennedy, 456 U.S. 667, 691-692 n. 34 (1982) (Stevens, J., concurring).

In view of the strength of the stare decisis doctrine and the importance of the policies the doctrine promotes, the Solicitor General has a heavy burden indeed to justify reversal of 12 years of judicial, medical and social adherence to Roe

v. Wade. The Solicitor General's task is all the more difficult because only two years ago in Akron this Court considered and rejected this position.

In an attempt to avoid this burden, the Solicitor General argues that continued attacks on Roe v. Wade and Akron indicate that the analytical framework of the cases is arbitrary and unworkable. Solicitor General's Brief at 16-30. Such arguments have no place in constitutional law. A vocal or influential minority should not be able to determine the extent or quality of fundamental rights merely by continued efforts to restrict the

rights of individuals at the instance of the legislative or executive branches of government.

In fact, the framework set forth in Roe v. Wade is neither arbitrary nor unworkable. Legislative bodies can easily deal with changing medical capabilities by framing legislation in terms of, for example, viability of the fetus, and by restricting the right after that point but not before. Similarly, regulations concerned with maternal health can be made more restrictive at the stage of a woman's pregnancy when, in the opinion of her physician, the risk of undergoing an abortion is increased. The diffi-

culty in this area lies not with the standards adopted in Roe v. Wade, but with the desire of many legislative bodies to regulate the medical decision to terminate a pregnancy to a much greater degree than other medical decisions.

As is demonstrated by the following review of the constitutional precedents on which Roe v. Wade is based, the Solicitor General's argument that a woman's right to terminate her pregnancy has no basis in the Constitution is equally ill-founded. Thus, the Solicitor General's arguments do not support the burden of proving that Roe v. Wade and Akron were incorrectly decided.

This Court is therefore urged to follow the principles of stare decisis and reaffirm its decisions in Roe v. Wade and Akron.

III. A WOMAN'S RIGHT TO CHOOSE WHETHER TO TERMINATE HER PREGNANCY IS A FUNDAMENTAL CONSTITUTIONAL RIGHT.

A. The Right to Reproductive Choice Is Grounded in the Right to Privacy In Family Matters.

In Roe v. Wade this Court held that the constitutional right of privacy encompasses a woman's right to decide whether to terminate

her pregnancy. The recognition of this right has been repeatedly reaffirmed in a long line of cases decided by this Court since Roe v. Wade, most recently Akron.[3] None-

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3 Doe v. Bolton, 410 U.S. 179 (1973); Bigelow v. Virginia, 421 U.S. 809 (1975); Connecticut v. Menillo, 423 U.S. 9 (1975); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Singleton v. Wulff, 428 U.S. 106 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Whalen v. Roe, 429 U.S. 589 (1977); Carey v. Population Services International, 431 U.S. 678 (1977); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979); Williams

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theless, the Solicitor General now chooses to challenge the historical and constitutional basis of that decision. Solicitor General's Brief at 24-29.

The constitutional foundation of Roe v. Wade evolved over the last half century from this Court's

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v. Zbaraz, 442 U.S. 1309 (1979); Harris v. McRae, 448 U.S. 297 (1980); H.L. v. Matheson, 450 U.S. 398 (1981); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, 462 U.S. 476 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983).

recognition of the fundamental nature of human interests relating to marriage, procreation and family. As early as the 1920's, this Court acknowledged that an individual's right of privacy embraced a general interest in avoiding disclosure of personal matters. In Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925), the Court upheld the rights of parents to direct the upbringing and education of their children free from unreasonable restraints. In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court recognized that the principles embodied

in Meyer and Pierce concern "the private realm of family life, which the state cannot enter." Id. at 166.

The Court soon recognized that a necessary corollary to the constitutionally protected right to control the upbringing and education of one's children is the right to determine when and whether to bear children. Thus, in Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court invalidated a state's compulsory sterilization law. The Court's recognition of the basic liberty interest in reproductive autonomy was based in part upon a distrust of the arbitrary manner in which government control over reproductive

matters might be exercised if the choice of begetting a child were transferred from the individual to the state. Id. at 541.

Recognition of the constitutional right to reproductive autonomy was further broadened in Griswold v. Connecticut, 381 U.S. 479 (1965), where a state statute prohibiting the use of contraceptives was declared an unconstitutional infringement of the rights surrounding the marital relationship. The Court recognized a right of marital privacy "older than the Bill of Rights -- older than our political parties,

older than our school system." Id. at 486.[4]

Acknowledging its fundamental nature, this Court extended Griswold's protection of a married person's right to practice contraception to include unmarried persons in Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court concluded that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affect-

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4 See also Loving v. Virginia, 388 U.S. 1, 12 (1967).

ing a person as the decision whether to bear or beget a child." Id. at 453 (emphasis in original).

Thus the right to reproductive choice, including the right to terminate a pregnancy, has long been recognized as a fundamental constitutional right, and is firmly grounded on a sound constitutional basis.

B. The Right to Reproductive Choice is Grounded In The Fourteenth Amendment.

Contrary to the Solicitor General's assertion that the decision in Roe v. Wade constitutes an "abrupt departure from the Court's prior decisions," Solicitor General's Brief at

28, Roe v. Wade was "based firmly on this long recognized and essential element of personal liberty." Akron v. Akron Center for Reproductive Health, 462 U.S. at 427. Prior to Roe v. Wade, the Court had long recognized the constitutional foundation of the right of privacy, finding its locus in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 116 U.S. 616 (1886), see Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connec-

ticut, 381 U.S., at 484-485; in the Ninth Amendment, id., at 486-87 (Goldberg, J., concurring); and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Thus, rather than abruptly departing from prior decisions, Roe v. Wade merely settled the locus of the long-recognized right by determining that, at least insofar as it encompasses reproductive choice, the right of privacy is "founded in the Fourteenth Amendment's conception of personal liberty and restrictions upon state action, [which] is broad enough to encompass a woman's deci-

sion whether or not to terminate her pregnancy." Roe v. Wade, 410 U.S. at 153. The Court's recognition of the right of privacy as an element of due process liberty rather than as an independent source of constitutional protection in the shadows or penumbras of the Bill of Rights is not a departure from prior cases, but merely a natural resolution of historical precedents. See Akron, 462 U.S. at 426; Whalen v. Roe, 429 U.S. 589, 598-599 n. 23 (1977).

The variety of the sources previously cited by the Court to support the existence of a fundamental right of privacy does not support a claim that it does not exist

at all, but shows the pervasive constitutional basis of the right. In the final analysis, the importance of the Court's recognition of such an essential right as that of an individual's privacy ultimately overshadows the Court's struggle in previous cases to pinpoint its locus.

The Solicitor General also denigrates the substantive due process foundation of Roe v. Wade, contending that it resurrects the era of Lochner v. New York, 198 U.S. 45 (1905). But the Lochner-era cases, which dealt primarily with state regulation of economic interests, are demonstrably different from cases concerning an individual's

autonomy in the exercise of reproductive rights. The fundamental nature of the right to privacy with respect to procreation in general, and the right to choose abortion in particular, demands that a greater degree of protection be afforded under modern substantive due process analysis and readily distinguishes these cases from those concerned with economic interests. See, e.g., Loving v. Virginia, 388 U.S. 1, and Shapiro v. Thompson, 394 U.S. 618 (1969).

C. The Right To Reproductive Choice Is Also Protected By The Establishment Clause Of The First Amendment.

The Solicitor General suggests that the Court in Roe v. Wade did not give sufficient consideration to the fetus as a human life. Solicitor General's Brief at 22-23. But this very question has philosophical, religious and medical elements for which there has been no substantial consensus in this country

-- now or at the time Roe v. Wade was decided.[5]

Legislation regulating abortion necessarily requires a legislative determination of the philosophical and religious question of when human life begins. To analyze this question as if the fetus has "life" from the moment of conception would be to permit the legislatures or courts to make a

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5 Tribe, The Supreme Court 1972 Term -- Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv.L.Rev. 1, 13 (1972); Mehren, A Refutation of 'Silent Scream,' Los Angeles Times, Aug. 17, 1985,
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philosophical and religious decision which is reserved to the conscience of each individual under the First Amendment. The Establishment Clause's proscription against state entanglement in religion would be violated if the legislature were able to define the beginning of life in order to regulate a woman's right to terminate a pregnancy. For this reason, it was not only appropriate but constitutionally mandatory for the Court in Roe v. Wade to give little credence to a so-called state

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Part V, at 1, col. 4 (hereinafter "Mehren").

interest in the potential life of the fetus, until the time when the fetus can in fact exist apart from the pregnant woman.[6]

D. The Right to Reproductive Choice Is Consistent With The Historical Context of Early Anti-Abortion Statutes.

The Solicitor General's historical argument collapses into a single attack against the existence of a privacy right encompassing a

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6 Even now the scientific debate on that issue continues, with new evidence that fetal viability may not exist until as (Continued)

woman's right to choose whether to terminate her pregnancy. Solicitor General's Brief at 25-29. The Solicitor General asserts that the right to choose had not been recognized when the Fourteenth Amendment was drafted and adopted in 1868, citing then-existing statutes criminalizing abortion. Roe v. Wade's exhaustive analysis of historical data, however, clearly shows that those statutes differentiated between early and late abortions.

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late as the 28th week after conception. Mehren, supra note 5, at 7, col. 2.

Late Nineteenth Century abortion statutes evidently sought to protect the mother from the high abortion mortality rates caused by the hazardous medical techniques then in use, techniques which become more dangerous later in pregnancy. Thus, those abortion statutes penalized later abortions more severely. Roe v. Wade, 410 U.S. at 148-9, 151. Roe v. Wade and subsequent cases have recognized that with the improvement of medical technology, an abortion during the initial stages of pregnancy is now safer than normal childbirth. Id. at 149. Thus, the rationale for restricting a woman's privacy rights which might have been

relied upon in the Nineteenth Century, and on which the Solicitor General premises his argument, no longer exists.

In fact, the harm imposed on women today through the denial of the right to choose to terminate a pregnancy exceeds the physical risk associated with early abortions. As the Court observed in Roe v. Wade:

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future.

> Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved."

Roe v. Wade, 410 U.S. at 153.

This recognition of the medical benefits of abortion is entirely consistent with the historical treatment of the right to abortion

and lends historical credibility to the rule of Roe v. Wade.

IV. STATE REGULATION OF THE FUNDAMENTAL RIGHT OF REPRODUCTIVE CHOICE MUST BE STRICTLY SCRUTINIZED.

A. State Regulation of Any Fundamental Right Demands Strict Scrutiny.

The standard for evaluating the constitutionality of state regulation of constitutional rights was set forth in San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973):

> "We must decide, first, whether [state regulation] . . . impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose. . ."

This Court has consistently applied this strict scrutiny standard of judicial review to cases in which the state action touches upon fundamental rights. See Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Kramer v. Union Free School District, 395 U.S. 621 (1969). In these cases

the Court has repeatedly ruled not only that a fundamental right cannot be restricted without a compelling state interest, but that the state-imposed requirements must be closely tailored to effectuate only the compelling state interest. Zablocki, 434 U.S. at 388. If there are reasonable ways to achieve the state's legitimate and compelling interest with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it does act, it must choose the least drastic means. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

The Court established in Roe v. Wade that a woman's funda-

mental right to choose whether to terminate a pregnancy must be judged by the same strict standard of judicial scrutiny as other fundamental rights. Roe v. Wade, 410 U.S. at 427. Since Roe v. Wade, the Court has consistently applied the strict scrutiny analysis to state attempts to regulate a woman's right to choose to terminate a pregnancy. For example, in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), the Court found that in the absence of a compelling state interest, the state cannot regulate or proscribe abortion. Similarly, in Maher v. Roe, 432 U.S. 464, 470, (1977), the Court specifically

applied the San Antonio School District standards quoted above to a state's attempt to regulate the right to reproductive choice.

B. Regulations That Impinge On The Fundamental Right To Reproductive Choice Cannot Withstand Strict Scrutiny.

In evaluating the constitutionality of state regulation of fundamental rights, a court must begin by determining whether the regulation impinges on the right. If it does, the statute is subject to strict scrutiny. Maher v. Roe, 32 U.S. at 470.

During the 12 years since Roe v. Wade was decided, the Court has evaluated numerous state attempts to regulate abortion. An analysis of these decisions reveals that state regulations impinge on the right to reproductive choice when they increase the costs of an abortion, require third party participation in the decision, or treat abortion differently from other medical procedures.

Thus, in Doe v. Bolton, 410 U.S. 179 (1973), the Court struck down a Georgia statute requiring abortions to be performed in hospitals because it impinged on a woman's right to reproductive choice

by increasing the cost of the procedure. Similarly, regulations have been held to illegally impinge on this right when they require a lengthy and inflexible recitation of information by the woman's physician, rather than by a trained counselor who could provide the same information at a lower cost. Akron, 462 U.S. at 445. This Court also concluded in Akron that regulations requiring a waiting period between a woman's submission of a signed consent form and the performance of the abortion impinged on the right to reproductive choice by the unwarranted additional cost of a second trip to the woman's physician. Id., at 450-51.

In Danforth, the requirement of spousal consent to a woman's decision to terminate her pregnancy was found to illegally impinge on her right to reproductive choice by fettering that right with the influence of third parties. For the same reason, in Bellotti v. Baird, 443 U.S. 622 (1979), a Massachusetts statute requiring the consent of a pregnant minor's parents before an abortion could be performed was found to impinge on the right of mature minors. Similarly, in Akron the Court found a presumption that all minors under the age of 15 were too immature to make that decision

without parental consent impinged on a mature minor's right to choose.

By comparison, the Court has approved regulations requiring that abortions be performed by a licensed, competent physician because those requirements are no more than would be required for any other operation. Roe v. Wade, 410 U.S. at 165; Connecticut v. Menillo, 423 U.S. at 10-11. As in other medical procedures, "informed consent" may be required, but information that "is designed not to inform the woman's consent but rather to persuade her to withhold it altogether" is prohibited. Akron, 462 U.S. at 444.

These decisions provide a clearly defined framework for scrutinizing state attempts to regulate a woman's exercise of her right to reproductive choice. They demonstrate that any statute which impinges on that fundamental right is constitutionally invalid unless there is a compelling state interest to justify it.

The Court has identified two legitimate state interests that underlie regulation of abortions: (1) preserving and protecting the health of the pregnant woman, which only becomes "compelling" when there is a greater risk of maternal mortality in abortion than in normal

childbirth; and (2) protecting the potentiality of life, which only becomes "compelling" when the fetus is capable of "meaningful life outside the mother's womb." Roe v. Wade, 410 U.S. at 154, 163. Neither interest is compelling in the first stage of pregnancy. Before state interests become compelling, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician without interference from the state. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 61, citing Roe v. Wade, 410 U.S. at 164.

If a regulation does not impinge on the fundamental right, rather than needing to show a compelling interest, the state must at least show a rational relationship between the regulation and its legitimate purpose. See, Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1982) (pathology exam required for each abortion performed upheld as useful in protecting woman's health and standard in all medical procedures); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 62. While some regulations have no significant impact on a woman's exercise of her right to reproductive choice,

and may be permissible where justified by an important state health objective, if the regulation is not reasonably designed to further those objectives the statute will fail the test. See Akron, 462 U.S. at 431, 434. To the extent that a challenged regulation establishes requirements which do not serve a legitimate interest of the state, it is unconstitutional and no further scrutiny is required. Doe v. Bolton, 410 U.S. 179 (1973) (statute's requirement that two physicians concur in the abortion decision is without "rational" connection to any legitimate interest of the patient's needs).

Thus, the parameters of permissible regulation are narrow, and broad regulations unrelated to compelling and legitimate state objectives cannot survive strict scrutiny.

C. The Strict Scrutiny Standard Was Properly Applied in Akron.

In Akron, the Court applied strict scrutiny to the City of Akron's sweeping abortion ordinance and struck down all of its provisions except those which were found to have no significant impact on a woman's fundamental right to decide to terminate a pregnancy. Akron, 462 U.S.

416. Using the strict scrutiny standard of review, the Court invalidated a hospitalization requirement for second trimester abortions because it "placed a significant obstacle in the path of women seeking an abortion" and was not justified as a reasonable health regulation. Akron, 462 U.S. at 434. The Court employed the same reasoning to strike down Akron's informed consent requirement, holding that it was not narrowly related to a legitimate purpose and that its real purpose was to withhold the woman's consent altogether. Akron, 462 U.S. at 444. In addition, the Court struck down requirements that the attending physician recite a detailed list of

"facts" about fetal development and the risks of abortion. Akron, 462 U.S. at 448.

Most significantly, this Court explicitly rejected suggestions that it adopt a new standard that would drastically curtail the right to reproductive choice, and rejected one such suggestion repeated here by the Solicitor General: that the Court apply an "undue burden" standard of review regardless of trimester. Solicitor General's Brief in Support of Petitioners at 8, 18, Akron, 462 U.S. 416.

Thus, by a vote of 6-3 the Court confirmed its continuing commitment to the constitutional principles articulated in Roe v. Wade,

including the application of strict scrutiny to the evaluation of statutes affecting fundamental rights. Contrary to the Solicitor General's arguments, the Akron decision was not an "abrupt departure," but a continuing application of the strict scrutiny analysis of fundamental rights long utilized by this Court.

The clear message of Akron, a message that can be derived independently of but consistently with Roe v. Wade, is that a woman has the right to choose to terminate a pregnancy and any attempt to abridge that right must be strictly circumscribed.

V. PUBLIC OPINION SUPPORTS REAFFIRMANCE OF ROE V. WADE.

The Solicitor General argues that because there has been loud controversy among some segments of the population regarding the Roe v. Wade decision, legislatures should be permitted to arbitrarily regulate a woman's right to choose whether to terminate her pregnancy. This argument mischaracterizes both the "controversy" and the Court's role in it. Public opinion supports the Roe v. Wade decision.[7] Even if

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7 The November 1981 issue of LIFE magazine reported the results of a survey on the (Continued)

it did not, however, the Court's function is not to abdicate its role

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attitude of American women toward abortion and related issues. That study found that 67% of all women believed that any woman who chose to have an abortion should be permitted to obtain one legally. That proportion increased in specific situations: 72% favored legal abortion if the woman were a pregnant unmarried teenager; 86% if the woman were an incest victim; 87% if the woman were carrying a genetically defective fetus; 88% if the woman had been raped; and 91% if the woman's health were at risk. In a February 1984 Washington Post-ABC News poll, 61% of those polled indicated that a woman should be able to obtain an abortion should she desire one. ("What Americans Think," The Washington Post National

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in the protection of individual rights because one segment of the population may wish to deprive the entire population of those rights.

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Weekly Edition, Mar. 12, 1984.) A 1984 Woman's Day survey found that 79% of its readers supported a woman's right to choose an abortion. ("What Women Voters Really Want," Woman's Day, Oct. 2, 1984.) A January 1985 ABC News Poll found that more than 50% of the American public now believe a woman has a right to abortion on demand. A majority thought the Roe v. Wade decision was "the right thing to do" and opposed a constitutional amendment to overrule it. Only 11% opposed abortion under all circumstances.

CONCLUSION

The foregoing discussion clearly demonstrates that both Roe v. Wade and Akron are firmly grounded on historical precedents and this Court's longstanding recognition of the fundamental right of privacy and the need to protect that right by strict scrutiny. Their reaffirmation is thus mandated not only by the doctrine of stare decisis, but also by sound constitutional principles. Amici therefore urge this Court to

reaffirm Roe v. Wade and its long line of progeny.

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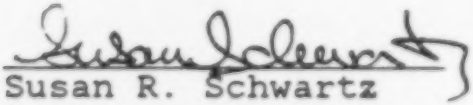

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EUGENE F. DIAMOND, et al.,

Appellants,

—v.—

ALLAN G. CHARLES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, INC., THE CENTER FOR POPULATION OPTIONS, THE AMERICAN JEWISH COMMITTEE, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN FAMILY PLANNING, THE NATIONAL BOARD OF THE YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A., NATIONAL ABORTION FEDERATION, ASSOCIATION OF PLANNED PARENTHOOD PROFESSIONALS, INC., PHYSICIANS FOR CHOICE, THE AMERICAN JEWISH CONGRESS AND INDIVIDUAL PROFESSORS, PHYSICIANS AND MEDICAL SCHOOL DEANS IN SUPPORT OF APPELLEES

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INTEREST OF AMICI*

Planned Parenthood Federation of America, Inc. (PPFA) is a not-for-profit corporation organized in 1922. PPFA is the leading national voluntary public health organization in the field of family planning with 186 affiliates in 44 states and the District of Columbia operating approximately 761 family planning clinics. Forty-four affiliates provide abortion services and most of the affiliates which do not perform abortions offer pregnancy counseling and referral.

The American Public Health Association (APHA) is a national nongovernmental organization. With a membership of over 50,000, it is the largest public health organization in the world. At its national conventions, APHA has repeatedly stated its support for legalized abortion.

The National Family Planning and Reproductive Health Association, Inc. (NFPRHA) is a national organization composed of providers and consumers of family planning and reproductive health care services under the federal Title X family planning program. It is devoted to the improvement of family planning throughout the United States.

The Center for Population Options (CPO) is a national organization concerned with the prevention of unintended adolescent pregnancy. CPO believes that the adolescent's option as to whether or not to have an abortion must be maintained.

The American Jewish Committee (AJC), a national organization dedicated to the protection of civil and religious rights, supports access to abortion as part of its traditional concern for individual liberty, privacy, and free choice.

National Association of Nurse Practitioners in Family Planning (NANPFP) is a national non-profit membership organiza-

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* All parties have given their consent to the filing of this brief in letters filed with the Clerk of this Court.

tion of professional nurse practitioners. The aim of the organization is to assure accessible quality family planning services which guarantee reproductive freedom to all.

The National Board of the Young Women's Christian Association of the U.S.A. (YWCA) represents over two million women and girls. The YWCA, a non-profit organization, has had a policy since 1967 of supporting a woman's right to choose whether or not to have an abortion, uncoerced by government.

National Abortion Federation (NAF) is a national, professional organization composed of abortion providers, individuals, and organizations active in the reproductive health care field. NAF is committed to making abortion services safe and accessible for all women.

Association of Planned Parenthood Professionals, Inc. (APPP) is a New York not-for-profit corporation whose members are physicians and health professionals associated with family planning.

Physicians for Choice, a project of PPFA, is a nationwide, bipartisan organization of 4,000 physicians which supports family planning issues and believes in preserving the right of women to decide when or whether to bear a child.

The American Jewish Congress is a national organization of American Jews. It neither favors nor opposes abortion but believes that a woman's decision whether to undergo abortion must be her own, uncoerced by government.

Individual Professors, Physicians and Medical School Deans practice obstetrics and gynecology as their medical specialty or are responsible for the education of medical students and residents, some of whom are in training in the specialty of obstetrics and gynecology.

Amici submit this brief in order to demonstrate for the Court the detrimental impact the Illinois law would have on the health and welfare of women in need of abortions.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Appellees.

Section 6(1) of the Illinois Abortion Law, setting a standard of care for aborting a fetus "known to be viable," is unconstitutional for two reasons. First, it requires physicians to adhere to an objective standard of viability, in violation of the holdings of this Court that physicians must be given leeway to make such judgments on a subjective basis. *Colautti v. Franklin*, 439 U.S. 379 (1979). Second, it is void for vagueness because it fails to specify what authority will set the standard against which the physician is judged.

Section 6(4) of the law, setting a standard of care for aborting "possibly viable" fetuses, is unconstitutional because it burdens the right to abortion prior to viability by making abortions costlier, less accessible and more painful and emotionally traumatic. It is also unconstitutionally vague because it fails to specify to which period in pregnancy it applies.

Sections 11(d) and 2(10) of the law, which require physicians to tell women that certain birth control methods are abortifacients, are unconstitutional because they require the rendition of non-informative, medically dubious and biased information. These provisions are also void under the Supremacy Clause because they are preempted by federal law regulating the labeling of contraceptives.

ARGUMENT

I. SECTION 6(1) OF THE ILLINOIS LAW UNCONSTITUTIONALLY RESTRICTS A WOMAN'S RIGHT TO ABORTION

Section 6(1) of the Illinois Abortion Law criminalizes the failure to use the same care in aborting a fetus which is "known to be viable" that the physician or his assistant would use in bringing a fetus to live birth. Ill. Rev. Stat. ch. 38, ¶ 81-26(1) (1983). *Amici* support the court of appeals holding that § 6(1) is unconstitutionally vague, encroaches on the exercise of the attending physician's medical judgment, and adversely impacts upon the woman's right to obtain an abortion. *Charles v. Daley*, 749 F.2d 452, 459-60 (7th Cir. 1984).

As this Court has observed, the viability determination itself is uncertain because of the number and imprecision of variables that must be considered. Moreover, different physicians equate viability with different probabilities of survival and some refuse to equate viability with any numerical probability at all. *Colautti*, 439 U.S. at 395-96. While physicians will necessarily disagree as to whether a particular fetus has reached viability, this Court has held repeatedly that "the determination of whether a particular fetus is viable is, and must be a matter for the judgment of the responsible attending physician." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 64 (1976); *Colautti*, 439 U.S. at 496-97. *See also Doe v. Bolton*, 410 U.S. 179, 192 (1973). The Illinois law fails to give deference to the individual judgment of the attending physician as required by these cases.

Moreover, the statute leaves unclear exactly what authority a physician must look to in order to determine viability. Does "known to be viable" refer to some general medical standard? If not, to what standard, expert or authority does this language refer? Because the statute does not specify whose medical judgment is determinative, it is unconstitutionally vague. *Colautti*, 439 U.S. at 393-94. This is especially true where, as here,

"the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Id.* at 391.

There is no doubt that the Illinois statute has a chilling effect on the exercise of constitutional rights. Physicians unwilling to risk criminal sanctions will be reluctant to perform certain second trimester abortions because their judgment will be held up to scrutiny based on an unknown standard. This burden on the exercise of the physician's medical judgment places an unconstitutional obstacle in the path of women seeking abortions. *Id.*; *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 (1983); *Charles v. Daley*, 749 F.2d at 460.

II. SECTION 6(4) OF THE ILLINOIS LAW SIGNIFICANTLY INTERFERES WITH A WOMAN'S RIGHT TO ABORTION AND IS NOT JUSTIFIED BY A COMPELLING STATE INTEREST

Section 6(4) of the Illinois law requires that a physician abort a "possibly" viable fetus in the same manner as he or she would attempt to bring such a fetus to live birth. Ill. Rev. Stat. ch. 38, ¶ 81-26(4) (1983). The law directly interferes with a woman's right to abortion in a number of significant ways. First, it forces a woman to end her pregnancy by methods which are costlier, lengthier, more painful and psychologically traumatic than those she might otherwise choose in consultation with her attending physician. Second, it visits criminal penalties on the woman's physician on the basis of criteria so vague and uncertain as to chill physicians in their willingness to perform abortions.

The Illinois law imposes these burdens solely in the interest of fetal life. Because it does so prior to viability, the point at which this Court has held that the state's interest in protecting fetal life becomes compelling, the law is unconstitutional. *Colautti*, 439 U.S. at 388-89; *Danforth*, 428 U.S. at 81-84.

A. The Illinois Law Interferes With the Right To Abortion By Requiring Abortions Which Are Costlier, Lengthier, More Painful and Psychologically Traumatic

Appellants claim that because the Illinois law does not require the physician to expose the woman to additional "medical risk," it imposes no legally significant burden on the right to abortion. Brief for Appellants at 40. This argument ignores the precedents of this Court which have viewed as burdens on the right to abortion factors other than increased medical risk, such as cost, delay, and decreased accessibility of abortion services. For example, in *Akron*, the Court ruled that a requirement of hospitalization for a second trimester abortion placed a "significant obstacle in the path of women seeking an abortion" because it would have increased the cost of the procedure and made it less accessible. 462 U.S. at 434-35. The same case struck down the enforced delay caused by a 24 hour waiting period for abortion. *Id.* at 449-51. *See also Danforth*, 428 U.S. at 75-79 (striking down ban on saline amniocentesis because it made post-first trimester abortions more difficult to obtain). The Illinois law imposes all these burdens and more.

1. *The Choice of Method*

There are three basic techniques for performing abortions in the second half of pregnancy.[1]

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1 This section of the brief assumes that the statute applies to a period of pregnancy somewhere between the 22nd and 24th weeks of gestation, the period during which sustained fetal survival apart from the mother becomes an extremely remote "possibility." The youngest reported surviving infants have been born at 23 weeks gestation. *See* Dunn & Stirrat, *Capable of Being Born Alive?*, 1 Lancet 553 (1984); *see generally* Williams *et al.*, *Fetal Growth and Perinatal Viability in California*, 59 Obstetrics and Gynecology 624 (1982). Yet, a leading obstetrics text states, "For infants as young as 23 weeks gestational age and as small as 600 grams, the mortality rate is essentially 100%." Pritchard *et al.*, Williams Obstetrics 749 (17th ed. 1985). As discussed in Part B, *infra*, however, the concept of "possibility" of viability is so vague as to be unconstitutional.

The first, known as dilatation and evacuation (D & E), is to dilate the woman's cervix and remove the products of conception with suction and instruments.[2] There is no possibility of fetal survival when this technique is used.[3] D & E is currently utilized in 20% of abortions of pregnancies of greater than 20 weeks gestation.[4]

A second method, the most common,[5] is to induce labor to expel the contents of the uterus. This may be accomplished by the intrauterine instillation of agents toxic to the fetus such as urea or hypertonic saline,[6] or by administration of chemicals such as prostaglandins which stimulate uterine contractions without harming the fetus.[7] The fetus is most likely to survive the prostaglandin abortion and least likely to survive the abortion utilizing urea.[8] The current method of choice is utilization of urea and prostaglandins in combination.[9]

A third method is hysterotomy, the surgical removal of the products of conception through an incision in the woman's

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2 *See generally* W. Hern, Abortion Practice 126 (1984).

3 Grimes, *Second Trimester Abortions in the United States*, 16 Family Planning Perspectives 260, 264 (1984).

4 Henshaw *et al.*, *A Portrait of American Women Who Obtain Abortions*, 17 Family Planning Perspectives 90, 93 Table 2 (1985).

5 *Id.*

6 Binkin *et al.*, *Urea-prostaglandin Versus Hypertonic Saline for Instillation Abortion*, 146 Am. J. Obstetrics and Gynecology 947, 950 (1983). *See generally* W. Hern, *supra* note 2, at 124.

7 Lee & Baggish, *Live Birth as a Complication of Second Trimester Abortion Induced With Intra-Amniotic Prostaglandin F_2 alpha*, 13 Advances in Planned Parenthood 7, 14 (1978).

8 Grimes, *supra* note 3, at 264.

9 *Id.* at 265.

uterus.[10] This method may result in live birth but is the most dangerous to the woman. It is, therefore, rarely used.[11]

Section 6(4)'s fetal protection mandate requires that a physician faced with this array of options favor a hysterotomy or prostaglandin-induced abortion over those methods which use agents toxic to the fetus such as saline or urea and to favor each of these methods over the D & E abortion.

While the "medical risk" provision of § 6(5) may allow the physician to rule out hysterotomy as clearly increasing medical risk to the woman, the choice among the other methods from a health viewpoint is less clear. In the second half of pregnancy, differences in maternal mortality among the methods are small.[12] There are differences in morbidity, but comparisons are complex, each method involving different types of rare serious complications.[13] Also, the safety of D & E abortions at this stage of pregnancy is related to operator skill and experience.[14] Given these varying factors and the severe criminal penalties which attend an error, the statute will clearly compel the physician to favor a labor-inducing abortion over D & E as the method least harmful to the fetus. There are a number of ways, however, in which selection of this method burdens a woman's right to abortion.

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10 Grimes & Cates, *Dilatation and Evacuation*, in Second Trimester Abortion, Perspectives After a Decade of Experience 119 (Berger *et al.* eds. 1981).

11 Grimes, *supra* note 3, at 262.

12 *Id.* at 263 Table 3.

13 *See* Kafrissen *et al.*, *Intra-amniotic Instillation of Hyperosmolar Urea and Prostaglandin F_2 alpha v. Dilatation and Evacuation*, 251 J.A.M.A. 916, 918 (1984); Binkin, *supra* note 6, at 947.

14 Kafrissen, *supra* note 13, at 919; U.S. Department of Health and Human Services, Centers for Disease Control Abortion Surveillance 1979-1980 at 14 (1983).

2. *D & E vs. Induction of Labor*

All health risks being equal, D & E has many advantages for the woman over the labor induction abortion. It is faster and less painful, entailing an operation which takes less than 20 minutes under local or general anesthesia as compared to a prolonged painful labor[15] lasting many hours.[16] An added advantage of D & E is that it may be performed on an out-patient basis, whereas instillation procedures require, at a minimum, overnight hospitalization.[17] This increases the accessibility of the procedure as the vast majority of hospitals refuse to permit any second trimester abortions;[18] it also relieves the woman of the ancillary costs of overnight hospitalization, including lost wages and child care expenses.

Labor induction abortions also tend to be more emotionally difficult for the woman, who must experience labor and delivery of a dead fetus or one that shows fleeting signs of life. Because the time of delivery is unpredictable, it frequently occurs when a physician is unavailable and/or when nursing staff is scarce. Thus, the woman may be alone during this experience.[19]

Finally, D & E abortions, whether performed on an inpatient or outpatient basis, are less expensive than instillation abor-

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15 Kafrissen, *supra* note 13, at 919.

16 Binkin *et al.*, *supra* note 6, at 948 Table II. Mean induction to abortion interval in this study was 14.2 hours for urea-prostaglandin abortions and 25.6 hours for saline abortions. *Id.*

17 Kafrissen, *supra* note 13, at 919. Fifty-eight percent of D & E abortions at 22 weeks' gestation were performed out of hospitals. Special Tabulation by the Alan Guttmacher Institute data tape compiled by the National Center for Health Statistics of the U.S. Department of Health and Human Services containing data on 300,000 abortions occurring in twelve states in 1980.

18 Only 10% of non-Catholic general hospitals perform mid-trimester abortions. Henshaw *et al.*, *Abortion Services in the United States, 1981 and 1982*, 16 Family Planning Perspectives 119, 123 (1984).

19 Rooks & Cates, *Emotional Impact of D & E vs. Instillation*, 9 Family Planning Perspectives 276, 276 (1977).

tions because they require less staff and institutional time.[20] The Illinois law allows none of these significant factors to be weighed in the woman's abortion decision.

3. *Labor Induction Methods Compared*

The preferred method of labor induction abortion is the intrauterine instillation of a solution of hyperosmolar urea and prostaglandins.[21] This method is the most toxic to the fetus of the induction methods but is also believed to be the safest for the woman.[22] Yet, apart from safety, there are other factors which lead physicians to favor this method over the saline abortion or the abortion using prostaglandins alone. Chief among these reasons is that it entails the shortest interval between instillation of the abortifacient agents and expulsion of the products of conception.[23] This shortened interval alleviates some of the psychological trauma and physical pain for the woman and lowers the cost of the procedure.[24] Yet, the Illinois law allows none of these factors to be taken into account in choosing an abortion method.

Another advantage of the urea-prostaglandin abortion is that because of the synergistic effect of the two chemicals, the level of prostaglandin can be lowered from what would be required in an abortion using only prostaglandins. This reduces

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20 Kafrissen, *supra* note 13, at 919.

21 Grimes, *supra* note 3, at 265.

22 Binkin *et al.*, *supra* note 6, at 950.

23 A large scale study showed that urea-prostaglandin abortions averaged 14.2 hours from instillation to expulsion of the fetus, while saline averaged 25.6 hours. Binkin *et al.*, *supra* note 6, at 948 Table II. Another study showed that 12 hours after the instillation of abortifacients, 21.4% of the patients receiving only urea, 47.8% of those receiving only prostaglandins and 77% of those receiving prostaglandins in combination with urea had aborted. Wilson, *Midtrimester Abortion with Urea, Prostaglandin F_2 alpha, Laminaria, and Oxytocin: A New Regimen*, 51 Obstetrics and Gynecology 699, 700-01 (1978).

24 Binkin, *et al.*, *supra* note 6, at 952.

some of the unpleasant side effects of prostaglandins, including nausea, dizziness and diarrhea.[25] Although some physicians may associate these minor side effects with increased medical risk, others may consider the association too tenuous to risk the criminal penalties of the statute.

The Illinois law also constrains the types of drugs that can be given to alleviate the pain the woman must undergo in a labor induction abortion. Physicians feel they can administer extremely effective analgesic drugs such as morphine to a woman experiencing an abortion, drugs which might be ruled out in alleviating the pain of childbirth because of adverse effects on the fetus.[26] The Illinois law would compel physicians to consider the health of the fetus in choosing pain medication, a consideration which would lead to increased pain for the woman.

The Illinois law adds to the cost of abortions in yet another way. Physicians who feel compelled to perform abortions by the method least toxic to the fetus, namely induction of labor by prostaglandin agents alone, may also feel compelled by professional ethics and fear of criminal prosecution to arrange for resuscitation and neonatal intensive care for aborted fetuses who may exhibit any sign of life.[27] In abortions utilizing prostaglandins alone, this rate can be as high as 7%.[28] Yet, live birth and viability are not equivalent[29] and the chance of such

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25 Wellman & Jacobson, *Intra-Amniotic Prostaglandin F_2 alpha and Urea for Midtrimester Abortion*, 27 Fertility and Sterility 1374, 1378 (1976); Wilson, *supra* note 23, at 701.

26 Magora *et al.*, *Epidural Morphine Analgesia in Second Trimester Induced Abortion*, 138 Am. J. Obstetrics and Gynecology 260 (1980).

27 *See, e.g.*, Lee & Baggish, *supra* note 7, at 8.

28 *See* Grimes, *supra* note 3, at 264.

29 The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Report and Recommendations, Research on the Fetus 55-56 (1975).

Section 6(4) introduces a new element of vagueness and removes this discretion. It puts physicians in the position of guessing what degree of probability separates the merely "possible" from the "reasonably likely". Inevitably, the result will be that in order to avoid the severe criminal penalties imposed by the statute, physicians will err on the side of caution, giving the statute its widest possible berth. They will feel constrained, therefore, to abandon the individual judgments envisioned in *Colautti* in favor of rigid formulas based on the latest medical miracle. A report of an isolated instance of survival of an extremely premature infant will cause many physicians to apply the restrictive provision of § 6(4) to *all* pregnancies of similar gestation, or even to refuse to perform abortions past that stage of pregnancy.

Thus, the vagueness of section 6(4) straitjackets physicians in their professional judgments, thereby impeding their patients' ability to obtain abortions. This is exactly the chilling effect on constitutional rights that this Court has sought to eliminate in the abortion cases.[34] *See Danforth*, 428 U.S. at 67 n.8; *Akron*, 462 U.S. at 427; *Colautti*, 439 U.S. 379.

C. No Compelling State Interest Justifies Section 6(4)

Section 6(4) restricts abortion rights prior to viability. As such, it may be justified only if it promotes the state's interest in maternal health. *Roe v. Wade*, 410 U.S. at 164. Clearly, no maternal health interest is implicated here. The statute is therefore invalid.

Appellants ask this Court to recognize an important interest in fetal life prior to viability sufficient to justify § 6(4)'s direct restrictions on the abortion right. Brief for Appellants at 43. Such an approach was clearly rejected by this Court in *Colautti*, where it stated that "viability is the critical point" when the state's compelling interest in fetal life or health arises and

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34 The idea that vague statutes lead persons to "steer far wider of the unlawful zone" and avoid conduct which would otherwise be constitutionally protected has long been recognized by this Court. *Hoffman Estates v. Flipside*, 455 U.S. 489, 494 n.6 (1982) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

"we have recognized no attempt to stretch the point of viability one way or the other." 439 U.S. at 389. By carving out a new, vaguely defined gray area prior to this critical point, appellants advocate just such a "stretching" of the state's power over a woman's abortion decision. *Amici* urge this Court to reject this approach and adhere to the clear precedent of its abortion decisions to date.

III. THE "ABORTIFACIENT WARNING" PROVISION OF THE ILLINOIS LAW IS UNCONSTITUTIONAL

A. The Statutory Provision Violates The Right To Privacy

The Illinois Abortion Law (§§ 11(d), 2(10)) requires physicians to describe methods of birth control that act after fertilization as "abortifacients". Ill. Rev. Stat. ch. 38, ¶¶ 81-31(d), 81-22(10) (1983).[35] This requirement is unconstitutional under the standards for informed consent laws set forth by this Court in *Akron*, 462 U.S. 416.

In *Akron*, this Court struck down a requirement that a physician recite an inflexible set of statements to every patient requesting an abortion. The Court held that the purpose of the "informed consent" script was not to inform, but to persuade the woman to withold her consent altogether because the physician was required to make misleading statements regarding the dangers of abortion and to articulate the state's theory of when life begins. *Id.* at 444-45.[36] The Illinois law suffers the

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35 Although the appellants claim that the statute does not require the physician to use any particular language, *see* Brief for Appellants at 12, the plain language of the statute indicates otherwise. Moreover, the State of Illinois is not before this Court to present its view on how the statute should be read. The court of appeals stated that, at the least, the statute requires the physician to tell the woman that certain birth control methods cause fetal death, a requirement which is no less objectionable. *Charles v. Daley*, 749 F.2d at 462.

36 The *Akron* law required the physician to tell the woman that "the unborn child is a human life from the moment of conception" and that abortion is a major surgical procedure with numerous possible complications, characterized by the Court as a " 'parade of horribles' intended to suggest that abortion is a particularly dangerous procedure." 462 U.S. at 445.

same defects. It articulates a medically dubious viewpoint, is essentially uninformative, and attempts to make the physician the mouthpiece for the state's theory of life. As such, it is pure propaganda, designed not to inform but to dissuade women from choosing certain birth control methods. It must be struck down as violative both of the standards of *Akron* and of a woman's right of access to contraceptives. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

1. *The Abortifacient Warning is not Informative.*

Appellants contend that telling women that drugs and devices which cause the demise of the fertilized egg are "abortifacients" serves to give them relevant information which is otherwise withheld by physicians. Brief for Appellants at 14. This is not true.

Millions of women in this country use methods of birth control which are believed to prevent pregnancy at least in part by interfering with the implantation of the fertilized ovum in the lining of the uterus. Chief among these are the intrauterine device (IUD) and the progestogen-only or "mini-pill". Contrary to appellants' insinuations, there is no medical conspiracy afoot to confuse or mislead women as to the way these methods work. Every woman requesting an IUD receives a brochure containing the following federally prescribed statement: "How the IUD prevents pregnancy is not completely understood. Several theories have been suggested. I.U.D.'s seem to interfere in some manner with the implantation of the fertilized egg in the lining of the uterine cavity. The IUD does not prevent ovulation." 21 C.F.R. §§ 310.502(b)(2), 801.427(b)(2) (1985) (Patient Information).[37] Similarly, every

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37 *Amicus* PPFA's patient brochure on IUDs states:

> There's no doubt that IUDs work, and work very well. Although we do not know all the ways in which an IUD works, one theory is that IUDs create a change (inflammation) in the lining of the uterus. This chronic inflammation keeps a fertilized egg from attaching itself to the lining of the uterus and starting a pregnancy. Also, the copper in a copper IUD can inactivate sperm.

(footnote continued)

package of oral contraceptives contains a pamphlet with the following statement: "the 'mini pill' contains only a progestogen. It works in part by preventing release of an egg from the ovary but also by keeping sperm from reaching the egg and by making the uterus (womb) less receptive to any fertilized egg that reaches it." 43 Fed. Reg. 4231 (1978).

The Illinois requirement, therefore, adds nothing to a woman's fund of knowledge about birth control. It merely adds the state's ideological gloss—that the mode of action of these contraceptives, in interfering with implantation, constitutes abortion—to the information she already receives in accordance with federal regulations. Clearly, the only purpose for this statement is to dissuade women from choosing these highly effective and widely used birth control methods.

2. *The Statutory Provision Requires Physicians to Impart Information Which Many View as Medically Inaccurate.*

The view that prevention of implantation of the fertilized egg constitutes an abortion is also contrary to accepted medical standards. The American College of Obstetricians and Gynecologists' glossary of terms for the field of obstetrics and gynecology defines "induced abortion" as the "deliberate interruption of pregnancy."[38] "Pregnancy" is defined as the "state of a female after conception and until termination of the gestation."[39] "Conception" is defined as "the implantation of the blastocyst. It is not synonymous with fertilization."[40] Using

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Planned Parenthood Federation of America, Understanding IUDs (revised 1985). PPFA's affiliates provide a contraceptive method to nearly 1.5 million patients each year.

See also Burnhill, *Intrauterine Contraception*, in Fertility Control 271, 280 (Corson, Derman and Tyrer eds. 1985) (physicians prescribing IUD's should verbally inform patients "that the IUD works primarily by preventing a fertilized egg from implanting").

38 Obstetric-Gynecologic Terminology 414 (E. Hughes ed. 1972)

39 *Id.* at 327.

40 *Id.* at 299.

these definitions, agents which work to prevent implantation or conception are contraceptives, not abortifacients.[41] The Illinois law, therefore, requires physicians to contravene the accepted views of their profession on this issue.

3. *The Statutory Provision Forces the Physician to Act as a Mouthpiece for the State's Theory of When Life Begins.*

The view that birth control methods which cause demise of the fertilized egg before implantation are "abortifacients" is based on the state's theory that human life and human pregnancy begin at the moment when sperm and egg unite and that, accordingly, any agent which interferes with the development of the fertilized ovum causes an abortion. As previously shown, this view is not based on medical principles; rather it is a philosophical or religious theory of when life begins. *Roe v. Wade*, 410 U.S. at 159-162. The state may not utilize such theories as the basis for intervention in the physician-patient consultation. *Akron*, 462 U.S. at 444; *Charles v. Carey*, 627 F.2d 772, 789 (7th Cir. 1980).

The Illinois law serves no purpose other than to convey to the woman the state's moral disapproval of her choice of birth control method and thus persuade her to forgo her choice. Such indoctrination of state values with no concomitant informative purpose is unconstitutional.

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41 *See also* the federally required patient package insert for diethylstilbestrol (DES), a drug which may be prescribed as a post-coital contraceptive in emergency situations such as rape. Although DES acts *after* fertilization to prevent implantation, *see* Morris & von Wagenen, *Interception: The Use of Postovulatory Estrogens to Prevent Implantation*, 115 Am. J. Obstetrics and Gynecology 101 (1973), the brochure states that "this treatment is usually effective in preventing pregnancy if used as described above. However, this drug will not cause an abortion if you are already pregnant." 21 C.F.R. § 310.501(b)(1). Thus, the federal Food and Drug Administration (FDA) subscribes to the prevailing medical view that the demise of the fertilized egg before it implants in the uterus is not an abortion.

B. The Abortifacient Warning Provision Of The Illinois Law Violates The Supremacy Clause.

Federal laws regulating the labeling of contraceptive drugs and devices preempt §§ 11(d) and 2(10) of the Illinois Abortion Law under the Supremacy Clause of the United States Constitution. Art. VI, § 2. Regulations of the IUD,[42] progestogen-only contraceptive pills[43] and diethylstilbestrol (DES),[44] promulgated under the Federal Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. § 301 *et seq.* (amended 1984), meet the criteria for determining federal preemption.[45] First, the Medical Device Amendments of the FDCA, *id.* §§ 360c-360k, are an unambiguous declaration by Congress that it occupies the field of regulating contraceptive devices. The amendments expressly preempt state regulations of medical devices, including IUDs, which are "different from, or in addition to" Food and Drug Administration (FDA) requirements. *Id.* § 360k(a). Second, the information in the federally mandated patient package inserts for contraceptive drugs and devices directly conflicts with the requirements of the Illinois law. Compliance with both the federal and state regulations is impossible; in addition, the Illinois law frustrates the purpose of the federal laws to promote safe and effective contraceptive use through accurate labeling.

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42 21 C.F.R. §§ 310.502, 801 *et seq.* (1985).

43 43 Fed. Reg. 4224 (1978).

44 21 C.F.R. § 310.501(b).

45 *See Ray v. Atlantic Richfield*, 435 U.S. 151, 157-59 (1978) (to determine preemption, look to (1) clear federal intent to preclude state regulation; (2) actual conflict; (3) state law as obstacle to federal purpose; (4) pervasiveness of federal regulation; or (5) dominance of federal regulation) (citations omitted).

1. *The Federal Law Expressly Preempts the Illinois Statutory Provisions.*

Congress expressly maintains exclusive control over the regulation of contraceptive devices. In 1976, Congress passed the comprehensive Medical Device Amendments of the FDCA ("Amendments"), *id.* §§ 360c-360k, in response to a Senate Health Subcommittee hearing on the Dalkon Shield IUD. The Senate had concluded that federal uniform standards for the IUD could have averted the Dalkon Shield's significant health hazard to women. *See* 1976 U.S. Code Cong. & Ad. News 1070, 1071. As a result, the FDA promulgated national standards for labeling all new medical devices, including the IUD. 41 Fed. Reg. 6896 (1976) (codified at 21 C.F.R. § 801 *et seq.*). In addition, the Amendments expressly provide for the preemption of any state regulation which "relates to" the federal law and is "different from" that law. 21 U.S.C. § 360k(a).

Requiring a doctor to call an IUD an "abortifacient" "relates to" the federal regulation governing the labeling for IUDs. Both the federal and Illinois laws set forth prescribed information which must be given to each woman seeking an IUD. In particular, the federal law requires that the IUD's "mode of action" be included in both the physician and patient package insert. Similarly, the Illinois law requires that the physician use the word "abortifacient," a term describing the way certain devices allegedly work in the woman's body.

The state statute also meets the second prong of the preemption test for medical devices: the Illinois law is substantially different from the federal law governing IUDs. The FDA defines the term "different" as different in an essential way so as to interfere with the FDA requirement. 43 Fed. Reg. 18663 (1978). Under 21 C.F.R. § 801.427(b)(1), each patient label must state that the IUD interferes somehow with the implantation of the fertilized egg to prevent pregnancy.[46] By contrast, under Illinois law, the doctor must describe the IUD's mode of action as abortifacient, not as preventing pregnancy. This

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46 *See supra* text accompanying note 37.

essential difference between the state and federal regulations clearly interferes with the FDA requirement. Describing an IUD as "abortifacient" does not promote the effective use of the device. It merely confuses women who read one explanation and hear another from their doctor.[47]

2. *The Illinois Law Conflicts with Federal Regulations*

As shown above, the federal regulations governing the labeling of contraceptive devices explicitly preempt the Illinois law. The Illinois law is also implicitly preempted by federal regulations of contraceptive drugs and devices because the Illinois law conflicts with the federal regulations. This Court has held that a conflict results in preemption if compliance with both the state and federal regulation is impossible or if the state regulation "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941); *see Ray v. Atlantic Richfield*, 435 U.S. 151, 158 (1978). The Illinois law and the regulations promulgated under the FDCA conflict in both respects.

The clearest example of a direct conflict comes from the information contained in the federally mandated patient package insert for DES. The federal pamphlet expressly states that the drug will not cause an abortion. 21 C.F.R.

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47 The Illinois law would not be exempted from preemption under § 360k(b) of the Amendments to the FDCA. The Commissioner may grant an exemption only if the state requirement is more "stringent" than the federal law or if it is required by local conditions. The Illinois law is not more stringent in that it does not reduce or eliminate health risks. *See Commonwealth of Massachusetts. v. Hayes*, 691 F.2d 57, 63 (1st Cir. 1982). Rather, it simply adds the state's ideological gloss to the federal requirements. *See supra* p. 17.

Moreover, requiring doctors to say "abortifacient" would not serve any public health interest, especially since the package insert already explains how the IUD works. Thus, the Illinois law is not exempt from preemption. *See* 43 Fed. Reg. 18664 (1978) (codified at 21 C.F.R. § 808.20(c)(7)).

§ 310.501(b)(4).[48] By contrast, the Illinois law requires the doctor to describe DES, a drug which takes effect after fertilization, as an abortifacient. Similarly, the federal insert for IUDs states that an IUD works after fertilization to *prevent* pregnancy, *id.* § 310.502, while the Illinois law requires that it be described as an agent which aborts a fetus.[49] Compliance with both the federal and state regulations would be impossible.

Moreover, the Illinois law frustrates the FDA's stated purpose of creating a uniform system of accurate labeling of contraceptive drugs and devices. The FDA's objective in requiring oral contraceptive labeling is stated as follows: "[t]he FDA is charged with assuring that drugs are safe and effective for their intended use and that their labeling provides adequate information for such use and is not false or misleading." 43 Fed. Reg. 4223 (1978). The FDA states a similar objective for its IUD package inserts: "in the interest of safe and effective use, and prevention of misleading labeling, there is a need to establish uniform physician and patient labeling for such devices." 21 C.F.R. §§ 310.502(b), 801.427(b). Requiring doctors to call IUDs, DES and progestogen-only pills abortifacients is just the sort of misleading and inaccurate information which the federal inserts were designed to avoid.

In sum, federal laws governing the dissemination of contraceptive information explicitly and implicitly preempt the Illinois Abortion Law. Thus, §§ 11(d) and 2(10) of the Illinois Abortion Law are unconstitutional under the Supremacy Clause of the United States Constitution.

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48 *See supra* note 41.

49 *See also* 21 C.F.R. § 884.5360 ("A contraceptive intrauterine device (IUD) is a device used to prevent pregnancy.").

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be affirmed.

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In the Supreme Court of the United States
October Term, 1984

Eugene F. Diamond, M.D. and
Jasper F. Williams, M.D.,
Appellants,

v.

Allan G. Charles, M.D., et al.,
Appellees,

and

The Hope Clinic for Women, Ltd., et al.,
Appellees.

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Court of Appeals for the Seventh Circuit

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In the Supreme Court of the United States
October Term, 1985

No. 84-495

Richard Thornburgh, et al., Appellants

v.

American College of Obstetricians and Gynecologists, et al., Appellees

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No. 84-1379

Eugene F. Diamond, et al., Appellants

v.

Allan G. Charles, et al., Appellees

On Appeal From the United States Courts of Appeals for the Third and Seventh Circuits

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Brief for an Ad Hoc Group of Law Professors As Amici Curiae in Support of Appellees

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CONSENT OF PARTIES

Amici curiae file this brief with the consent of all the parties in support of the position advanced by the appellees.

INTEREST OF AMICI CURIAE

Amici Curiae are the individuals listed who compose an ad hoc group of professors teaching at various American law schools. The group represents a cross section of views and diverse interests. Amici all recognize the importance and emotional timbre of the issues raised in this case. They, however, believe that these issues should not be resolved at the expense of impugning the integrity of the federal judicial process simply because of the zealousness and fervor surrounding their public debate. Amici recognize and support the logical and orderly procedural flow of litigation, as well as adherence to constitutional requirements for the exercise of appellate jurisdiction. Amici, therefore, urge this Court to dismiss these cases for lack of jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than a decade has passed since this Court's land-mark decision in Roe v. Wade, 410 U.S. 113 (1973) (hereafter Roe) articulated the fundamental constitutional protection of a woman's right to obtain an abortion. In the intervening years, this Court consistently has reaffirmed its position in a succession of cases challenging the practical application of the tenets of Roe.[1] These two cases once more appear to question this Court's strength of conviction in its interpretation of Roe in several

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1/ See Connecticut v. Menillo, 423 U.S. 9 (1975); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979); Harris v. McRae, 448 U.S. 297 (1980); H.L. v. Matheson, 450 U.S. 398 (1981).

recent similar decisions.[2] This appearance, however, is deceptive and illusionary. Both of these cases are improperly before this Court. Appellants have failed to satisfy fundamental requirements necessary for the exercise of appellate jurisdiction by this Court.

In Thornburgh, appellants, in their zeal, seek to disrupt the logical and orderly procedural flow of litigation by having this Court abandon the century long practice of restricting review on appeal from a Circuit Court of Appeals decision to only those cases involving final judgements. In addition, because of intervening circumstances, that specific part of the appeal seeking review of the Parental Consent/Judicial Approval provi-

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2/ Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983).

sions, §3206 of the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. Am. §§3201-3220 (Purdon 1983) (hereafter the "Pennsylvania Act") presently is moot as a matter of appellate review and ripe for review by the District Court.

Similarly, in Diamond, there is no live case or controversy for the exercise of federal judicial power. Appellants, District Court intervenors, lack the requisite standing necessary to bring the case to this Court. The District Court order granting appellants the right to intervene in the first place is not dispositive of whether they now have standing. None of the originally named party-defendants, governmental officials representing the State of Illinois, have filed an appeal or adopted appellants' brief in this case. In fact, all of the state representatives have been realigned as appellees in the case before this Court.

I. TRADITIONAL PRINCIPLES OF FINALITY OF JUDGMENTS REQUIRE DISMISSAL OF THE APPEAL UNDER 28 U.S.C. §1254(2) OF PART OF AN INTERLOCUTORY ORDER ISSUED BY THE CIRCUIT COURT OF APPEALS IN THORNBURGH

This case was brought to the Circuit Court of Appeals on cross-appeals from a District Court order, entered on a hastily stipulated record, denying a substantial, but not total, part of plaintiff's request for a preliminary injunction of the Pennsylvania Act. The case was twice briefed, as well as orally argued. In between, this Court announced its decisions in three factually similar cases, Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983), Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)and Simopoulos v. Virginia, 462 U.S. 506 (1983). After thoughtful and methodical consideration, the Circuit Court of Appeals finally concluded that certain

sections of the Pennsylania Act were unconstitutional as a matter of law as written. The original denial of the preliminary injunction was reversed in part and the case was remanded to the District Court "for further proceedings in accordance with [its] opinion." American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 304 (3rd Cir. 1984). Judgement was not entered for the plaintiffs. Significant parts of the Pennsylvania Act still require District Court review during which both plaintiffs and defendants may engage actively in trial litigation by offering additional evidence and legal arguments. The Commonwealth of Pennsylvania has not appealed certain issues but reserved them for further litigation before the Distict Court. (E.g. §3205(a)(2) of the Pennsylvania Act.) Since the Circuit Court of Appeal's order, plain-

tiffs have renewed their motion before the District Court for a preliminary injunction of additional provisions of the Pennsylvania Act. A full evidentiary hearing has been held and a final hearing on the merits should be scheduled shortly. The District Court decision on these and other matters undoubtedly will be appealed to the Circuit Court of Appeals and, probably, to this Court, as well.

The complicated and fragmented procedural posture of the case, argues in persuasive decibels, that the interlocutory order of the Circuit Court of Appeals clearly lacks the degree of finality required for the exercise by this Court of mandatory appellate jurisdiction under 28 U.S.C. §1254(2) (hereafter §1254(2)).

This Court consistently has required that appeals can be taken only from final judgments of the Circuit Court of Appeals to the United States Supreme Court.

> Under the Act of February 13, 1925 [the Amended Judicial Code of 1925], §240(b) [the predecessor to §1254(2)] appeals to this Court from Circuit Court of Appeals lie only from final judgments or decrees in cases where the validity of a state statute is drawn in question on the ground of repugnance to the Constitution, treaties, or laws of the United States, and the decision is against its validity. (citations omitted)

Slaker v. O'Conner, 278 U.S. 188, 189-190 (1929). This finality requirement was read directly into §1254(2) in South Carolina Electric and Gas Co. v. Flemming, 351 U.S. 901 (1956) (per curiam). Neither case has been overruled and clearly are controlling precedent here.[3]

3/ Neither New Orleans v. Dukes, 427 U.S. 297 (1976), Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), El Paso v. Simmons, 379 U.S. 497 (1964) (per curiam) nor Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77 (1958), reached the merits of the issue presently before the court. In any event, all four cases are factually distinguishable.

It is neither surprising nor confusing that §240(b) of the amended Judicial Code of 1925 and 28 U.S.C. §1254(2) contain no explicit finality language. The final judgement requirement within the federal court system finds its historical roots in the practice of the common law in the courts of England[4] and in the first Judiciary Act of 1789, 1 Stat. 73, c. 20 §22. Finality has been deemed a longstanding rule of procedural practice implicit in all prior acts of Congress, equally silent in their terms on this matter, related to United States Supreme Court appellate jurisdiction. See generally, Crick, The Final Judgement as a Basis for Appeal, 41 Yale L.J. 539 (1932). When the

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4/ E.g. Metcalfe's Case, 77 Eng. Rep. 1193 (K.B. 1615); U.S. v. Girault, 52 U.S. 22 (1850); Holcombe v. McKusick, 61 U.S. 552 (1857).

Circuit Courts of Appeal were created by the Evarts Act of March 3, 1891, 26 Stat. 826, this Court reaffirmed in clear and unmistakable terms the applicability of the final judgement requirement for access to the United States Supreme Court by appeal.

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error,... have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. Forgay v. Conrad, 6 How. 201, 204. The Construction [of non-finality] contended for would render the act under consideration inconsistent with this long established object and policy. More than this, it would defeat the very object for which that act was passed. . . . . . .[T]he distribution of the entire appellate jurisdiction of our national judicial system, between the Supreme Court of the United States and the Circuit Court of Appeals, . . . by designating the classes of cases in respect of which each of those two courts

shall respectively have final jurisdiction. . . . [T]here is, we think, no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of Federal courts as to extend the jurisdiction of the Supreme Court to the review of jurisdictional cases in advance of the final judgments upon them.

But there is an additional reason why the omission of the word final . . . should not be held to imply that the purpose of the act is to extend the right of appeal to any question of jurisdiction, in advance of the final judgment, at any time it may arise in the progress of the cause in the court below. Such implication, if tenable, cannot be restricted to questions of jurisdiction alone. It applies equally to cases that involve the construction or application of the Constitution of the United States; and to cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; and to those in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Under such a construction all these most important classes of cases could be directly taken by writ of error or appeal, ... to this court, independently of any final judgment upon them. The

> effect of such a construction, if sanctioned, would subject this court to the needless delays and labor of several successive appeals in the same case, which, ... by awaiting the final judgment, could be promptly decided in one appeal.

McLish v. Roff, 141 U.S.661,665-667 (1891).

§1254(2), as originally enacted as §240(b), was an amendment to the Judge's Bill of 1925 drafted by Justices deeply concerned about the U.S. Supreme Court's caseload. John Simpson, Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court, 6 Hastings Const. L.Q. 297, 299 n.7 (Fall, 1978), James F. Blumstein, The Supreme Court's Jurisdiction - Reform Proposals, Discretionary Review, and Writ Dismissals, 26 Vand. L. Rev. 895, 898-899 (1973); F. Frankfurter and J. Landis, The Business of the Supreme Court, 273-278 (Johnson Reprint Corp., N.Y. 1972). §240(b) was a Senate compromise measure designed to place circuit courts of

appeal and state courts, pursuant to §237(a), 43 Stat. 937 (now 28 U.S.C. §1257(a)), in "perfect parity, allowing a writ error from the circuit court of appeals under conditions exactly the same, except reversed, and allowing a writ of certiorari in the one case as in the other case, so that the two would be entirely harmonious." Frankfurter and Landis, supra. at 278 (citing Sen. Walsh, 66 Cong. Rec. 2923); see also Simpson, supra. at 313. While §237(a), directed to state courts with varying appellate practices, explicitly required finality, §240(b) merely reflected codification of historical federal court practice.[5]

5/ This comparison is not intended to imply any other similarity of requirements under these statutes.

The finality requirement, for some time, has served as one of a number of measures aimed at relieving the burden of the Supreme Court caseload by reducing the number of cases requiring mandatory appellate review. Congressional policy has been to restrict the mandatory appellate jurisdiction of the U.S. Supreme Court.[6] This Court has recognized

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6/ The Evarts Act, Act of March 3, 1891, 26 Stat. 826, established the federal Circuit Courts of Appeal and U.S. Supreme Court' certiorari authority over certain cases. The Act of September 6, 1916 Ch. 448, 39 Stat. 726, provided a right of appeal to the U.S. Supreme Court from state court only where a federal statute, treaty, authority or right was struck down or a state statute upheld against federal challenge. The Act of February 13, 1925, Ch. 229, 43 Stat. 936, the Judge's Bill of 1925, widely substituted certiorari review for a significant part of U.S. Supreme Court mandatory appellate jurisdiction. The Act of August 12, 1976, 90 Stat. 1120, by repealing 28 U.S.C. §§ 2281, 2282 and 2403, abolished direct appeals to the United States Supreme Court from most three-judge district courts.

the Congressional policy. Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974), Flanagan v. United States, __ U.S. ___, 104 S.Ct. 1051, 1054 (1984) and has followed it strictly when interpreting statutes authorizing appeal, Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37, 43 (1983). In fact, Congress, this Court, and numerous legal commentators have all pressed for yet further restrictions in the mandatory appellate jurisdiction of the Supreme Court.[7]

To ignore the lack of finality of the Circuit Court of Appeals order before the Court is likely to produce negative consequences beyond the scope of this case. The recent repeal of the three-judge district court statutes was designed to eliminate direct appellate access to the United States

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7/See, Simpson, supra. at 298-300, fns. 7-13, for a detailed listing of authorities.

Supreme Court in cases challenging the Constitutionality of state statutes (Simpson, supra., at 299 fn. 7). Any diminution in the finality requirement under §1254(2), much less a wholesale abandonment of the requirement in this case, certainly would defeat the purpose of the Congressional repeal. Most cases previously heard by three-judge panels would wind up before the U.S. Supreme Court on mandatory appeal. Since many of these cases often involve the grant or denial of interlocutory relief pending the outcome of final litigation, it is not inconceiveable that many of these cases probably would come before this Court more than once.

The appeal in this case also underscores the fact that broader systemic process interests are served by the final judgement rule. By preventing piecemeal U.S. Supreme Court review of discretionary interlocutory orders, disruption and delay of trial court func-

tions, as well as strain on the judicial system and the parties is minimized. Flanagan v. U.S., ___ U.S. ___, 104 S. Ct. 1051, 1054 (1984); Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981). This case is a textbook example of piecemeal litigation and all its attendant problems. Aspects of this case can be found at every level of the federal judicial system, virtually insuring that additional issues in this case will be appealed at some future date to this Court. The integrity of the federal judicial system, as well as Congressional intent to restrict mandatory appeals to the U.S. Supreme Court are best served by application of the final judgement rule to dismiss this appeal.

II. THE SUPERVENING ENACTMENT OF PENNSYLVANIA ORPHANS' COURT RULE 16 REQUIRES VACATING, AS MOOT, THE APPEAL FROM THAT PORTION OF THE CIRCUIT COURT OF APPEAL'S ORDER IN THORNBURGH ENJOINING THE ENFORCEMENT OF §3206 OF THE PENNSYLVANIA ABORTION CONTROL ACT ON PARENTAL CONSENT OR JUDICIAL APPROVAL FOR MINORS

The judicial power of the federal courts is limited by the case or controversy requirements of the United States Constitution, Article III §2 (hereafter Article III) and related doctrines of justiciability, such as mootness.

DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (citing Liner v. Jafeo, Inc., 375 U.S. 301, 306 fn. 3 (1964); United States Parole Commission, et al. v. Geraghty, 445 U.S. 388, 395-96 (1980). The mootness doctrine addresses circumstances destroying the justiciability of a case otherwise previously appropriate for determination by a Court. A case or controversy must remain alive

throughout every stage of appellate review. Kremens v. Bartley, 431 U.S. 119, 128 (1977); Preiser v. Newkirk, 422 U.S. 395, 401-404 (1975). Such determinations of justiciability require this Court to review lower court orders on appeal in light of presently existing law not that in effect when judgement was entered. Fusari v. Steinberg, 419 U.S. 379, 388 (1975); Cort v. Ash, 422 U.S. 66, 74-76 (1975); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972); Hall v. Beals, 396 U.S. 45, 48 (1969); United States v. Alabama, 396 U.S. 602, 604 (1960). A finding of mootness is appropriate when supervening legislation specifically eliminates the original basis for lower court action. Attwell v. Nichols, 608 F.2d 228, 230-231 (5th Cir. 1979), cert. denied 446 U.S. 955 (1980).

The Third Circuit Court of Appeals enjoined the enforcement of §3206 of the

Pennsylvania Act, providing for parental consent or judicial approval for unemancipated minors to obtain an abortion, only until regulations were promulgated containing detailed provisions assuring confidentiality and dispatch. American College of Obstetricians and Gynecologists, et al., v. Thornburgh, et al., 737 F.2d 283, 296-297 (3rd Cir. 1984). On November 26, 1984, the Pennsylvania Supreme Court adopted new rules. Effective immediately, New Pennsylvania Orphans' Court Rule 16 (hereafter Rule 16) provided, inter alia, for confidentiality and dispatch of proceedings under §3206. By its own terms, the Circuit Court of Appeals injunction §3206 then expired. As a consequence, the basis for appellate review also disappeared.

The constitutionality of Rule 16 should not be considered by this Court at this time. The Circuit Court of Appeals clearly stated:

> Although we do not invalidate §3206, its operation should be enjoined until the state promulgates regulations, without prejudice to the right of these or other plaintiffs to attempt to demonstrate in this action if still pending, or in some future action, that the regulations are unconstitutional.

American College of Obstetricians and Gynecologists et al., v. Thornburgh et al., 737 F.2d 283, 297 (1984).

No lower court has passed on the question of the constitutionality of Rule 16. The Federal District Court is the appropriate forum for initial review of and judgement on this Rule. Significant portions of this case already currently are pending before that court on remand from the Circuit Court of Appeals. District Court review, therefore, will not unfairly or unreasonably delay final judgement in this case. There presently is no factual record addressing the provisions of the Rule. Nor has either side had a full opportunity to develop legal arguments. This

case is before the Court on the parties' District Court stipulation of uncontested facts submitted on November 30, 1982. Even the Circuit Court of Appeals was not able to review the substantive constitutionality of the Rule by the time its May 31, 1984 order was entered, or when it denied rehearing June 28, 1984.

Rule 16 was not even promulgated until November 26, 1984.

In addition, this Court recently has provided authoritative guidance to District Courts on the very issue of the constitutionality of parental consent provisions. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 476 (1983, Planned Parenthood Association v. Asncroft, 462 U.S. 467 (1983). Application of these and other Supreme Court precedent is not merely a matter of law.

> [t]he Missouri statute upheld in Ashcroft establishing alternative court proceedings for minor consent contained detailed provisions assuring confidentiality and dispatch, establishing a clear and simple procedure for the minor to follow in setting forth her petition, and directing court personnel to assist the minor in preparing the petition. Comparable provisions are absent in the Pennsylvania statute. This difference is critical. To pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form.

American College of Obstetricians and Gynecologists et al. v. Thornburgh, et al., 737 F.2d at 297.

The standard disposition in a federal civil case that has become moot pending appeal "is to reverse or vacate the judgement below and remand with a direction to dismiss." United States v. Munsingwear, 340 U.S. 38, 39 and fn. 2 (1950). While that part of the Circuit Court of Appeals order enjoining §3206 should be found moot and

vacated, circumstances clearly warrant further evidentiary consideration of the constitutionality of Rule 16 upon remand to the District Court. See, in accord: United Building and Construction v. Council of Camden, ___ U.S. ___, 104 S.Ct. 1020, 1030 (1984); Hill v. Printing Industries of Gulf Coast, 422 U.S. 937, 938 (1975) (per curiam); White v. Regester, 422 U.S. 935, 936 (1975) (per curiam); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 415 (1972).

III. THE LACK OF AN ARTICLE III §2 LIVE CASE OR CONTROVERSY IN DIAMOND REQUIRES THIS COURT TO DISMISS THE APPEAL

Article III §2 requires a live case or controversy for the exercise of federal judicial power.

> a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such

> that judicial determination is consonant with what was, generally speaking, the business of the... Courts... when the Constitution was framed.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (concurring opinion) (1951); see also, United Steelworkers of America v. U.S., 361 U.S. 39, 60 (1959) (Frankfurter, J., concurring).

Plaintiffs could never have sued appellants, District Court intervenors, in this case. Plaintiffs brought this case under 42 U.S.C. §1983 (hereafter 1983) challenging the constitutionality of the provisions of the Illinois Abortion Law of 1975 as amended, October 30, 1979, S.H.A. Ill. Ch. 38 §81-11 to §81-34 (Smith-Hurd Supp. 1982) (hereafter the Illinois Act). Some form of state action is a prerequisite to asserting and maintaining jurisdiction under §1983. Official actions of representatives of a state, actions in concert with

such representatives or actions under color of state law are required. Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 928-930 (1982); Parratt v. Taylor, 451 U.S. 527, 535 (1981). Review of the appellants' motion in support of their petition to intervene reconfirms that they sought to protect personal and private "professional interest[s] in statutory restrictions on abortion." (Motion to Intervene and Petition for Appointment of Guardian Ad Litem) (hereafter Motion to Intervene). Appellants are not state officials nor have they acted in concert with the state or under color of state law. In fact, appellants have admitted this. They have denied any liability for the amount of attorney's fees awarded to plaintiffs by the District Court (Motion to Amend the Judgement Pursuant to Fed.R.Civ.P. 59(E) at §10) (hereafter Motion to Amend).

The Illinois Act in this case is a criminal statute. It provides for criminal prosecution and/or fines for violation of its terms. S.H.A. Ill. ch. 38 §81-26 and §81-31. Criminal statutes can not be enforced by private citizens. Only the state, through its official representatives, may enforce, and by implication, defend a criminal statute. Bordenkircher v. Hayes 434 U.S. 357, 365 (1978); U.S. v. Batchelder, 442 U.S. 113, 125 (1979) The State of Illinois has not appealed the Circuit Court of Appeals judgement to this Court. Nor has the State of Illinois adopted the appellants' brief or jurisdictional statement in this appeal.[8] This Court's decision in Princeton Univer-

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8/See letter dated July 15, 1985 from Michael J. Hayes, Director of Advocacy, State of Illinois Attorney General to Mr. Alexander Stevas, United States Supreme Court Clerk of the Court. The State of Illinois has failed to comply with Supreme Court Rules 10.1-10.4, 10.6 and 34.1 or otherwise conduct itself like a party.

sity v. Schmid, 455 U.S. 100 (1982) is dispositive of the present case. The Court dismissed an appeal by Princeton University of a New Jersey Supreme Court reversal of a criminal trespass conviction. Schmid, a non-student defendant, was convicted of trespass for violating Princeton University regulations on University property. The University was asked to intervene before the New Jersey Supreme Court which then overruled the conviction on First Amendment grounds. The University filed a notice of appeal and a jurisdictional statement. The State of New Jersey joined in the University statement but did not file separately. It filed a brief asking this Court to decide the case but declined to take a position on the merits. The Court concluded that:

> Had the University not been a party to this case in the New Jersey Supreme Court and had the State filed a jurisdictional statement urging reversal, the existence of a case or controversy--and the

> jurisdiction in this Court--could not be doubted. However, if the State were the sole appellant and its jurisdictional statement simply asked for review and declined to take a position on the merits, we would have dismissed the appeal for want of a case or controversy. We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us. See e.g., Sierra Club v. Morton, 405 U.S. 727, 731-732, 92 S.Ct. 1361, 1364-1365, 31 L.Ed.2d 636 (1972); Flast v. Cohen, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968). Thus the presence of the State of New Jersey in this case does not provide a sound jurisdictional basis for undertaking to decide difficult constitutional issues.

Princeton University v. Schmid, 455 U.S. 100, 102 (1982)

See, in accord, City of Chicago v. Rapid Transit Co., 284 U.S. 577, 578 (1931).

In this case the State of Illinois has not even engaged in the minimal level of appellate participation previously found insufficient to invoke this Court's appellate jurisdiction.

Appellants, as private parties, lack the standing necessary to maintain this case. The District Court determination that intervention was appropriate is not conclusive. Standing requirements control whether a litigant is the appropriate party for advancing a particular legal claim. Warth v. Seldin, 422 U.S. 490, 500 (1975); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 484 (1982); Flast v. Cohen, 392 U.S. 83, 99 (1968). Even if intervention once was appropriate, the constitutional inquiry into the propriety of a party's standing is a jurisdictional issue that may be raised at any time, even on appeal, or by this Court sua sponte. Regents of University of California v. Bakke, 438 U.S. 265, 281 fn. 14 (1978); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 260 (1977).

> The constitutional dimension of standing theory, requires, at the very least, that there be an actual injury redressable by the Court.

Director, Office of Worker's Compensation Programs v. Perini North River Assocs., ___ U.S. ___, 103 S.Ct. 634, 640 (1983).

Appellants have no legally cognizable interest in the Illinois Act that should permit them to maintain this appeal. They have not demonstrated any concrete or direct injury from the continued enforcement of the Circuit Court of Appeals injunction of the Illinois Act. At best, appellants' personal and professional convictions may be offended. Similarly, enforcement of the Illinois Act can give appellants only personal gratification. Appellants simply do not have interests in this case significantly distinct from those they share in common with other citizens in the State of Illinois who may want to see the Illinois Act enforced.

Appellants could not have sued the State

of Illinois to compel enforcement of the Act. Private citizens who have no more than an abstract or intellectual interest in the enforcement or nonenforcement of state statutes consistently have been denied standing to sue. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 484(1982); Simon v. Eastern Kentucky Welfare Organization, 426 U.S. 26, 40 (1976); Linda R.S. v. Richard D. et al., 410 U.S. 614, 617 (1976); Allen v. Wright, __ U.S. __, 104 S.Ct. 3315, 3325 (1984).

Similarly, criminal defendants regularly have been denied standing to invoke the United States Constitution Fourth Amendment rights of a third party. United States v. Payner, 447 U.S. 727, 731 (1980); Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); Rakas v. Illinois, 439 U.S. 128, 141 (1978); Zurcher v. Stanford Daily, 436 U.S. 547, 553

(1978); Brown, et al. v. United States, 411 U.S. 223, 227 (1973).

Recent events merely underscore the inadequacy of appellants' legal interest in maintaining this case before the Court. On April 22, 1985, the District Court held appellants jointly and severally liable to plaintiffs for over $100,000.00 in attorney's fees. Appellants responded by filing a Motion to Amend the Judgement to dismiss the present appellants and name Americans United for Life, Inc. (hereafter AUL) as the sole intervening defendant. In the alternative, they want the court to clarify the original intervention order by stating "that AUL is an intervening defendant for all purposes, including the assessment of attorney's fees." (Motion to Amend at §7). This motion to amend or clarify was based on the discrepency between the original Petition to Intervene in which appellants were named and the District

Court Order to Intervene in which AUL alone was named as intervenor. The Motion acknowledges that the present appellants were solicited by AUL to intervene in this case, but "AUL is the real party in interest." (Motion to Amend at §9). In addition, on June 28, 1985, counsel moved, pursuant to FRCP 25(a) to substitute AUL for appellant, Dr. Jasper Williams, who died in a recent plane crash. This motion presently is under consideration by the District Court. There is little likelihood that the Court will grant either of these motions. In a case challenging the recent additional amendments to the Illinois Act, the Seventh Circuit Court of Appeals affirmed a denial of both mandatory and permissive intervention to an organization similar to the AUL.

> In summary, then, IPC has presented no direct and substantial interest that can be secured by its participation in this lawsuit. Neither its interests as lobbyist, guardian of fetal rights, nor

> potential adoptive parents of adopted fetus "born alive," either separately or together, support its right to intervene in this lawsuit. The district court's finding that IPC failed to establish a significant, legally protectable interest, is, therefore, affirmed.

Keith v. Daley and Illinois Pro-Life Coalition, No. 84-2860, slip op. at 11 (7th Circuit Court of Appeals, June 18, 1985).

The consequences of recognizing the appellants in this case extend beyond the obvious distortion of several doctrines of justiciability. This Court recently has attempted to clarify the parameters of the state action doctrine. Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922 (1982); Brooks v. Flagg Brothers., Inc., 436 U.S. 149 (1978); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974). These events would be stymied by a decision to review this case on appeal.

CONCLUSION

The Court must not let the urgent and pressing nature of the issues presented in these cases compromise the appellate process. Access to appellate review by this Court is a venerable and precious, but all too fragile, right. We urge the Court to recognize that there is an approprite time and place for every case to be heard. In the present cases, however, it is neither the time, nor, this Court, the place for decision. We urge the Court to dismiss the appeals in both cases for lack of jurisdiction.

Respectfully submitted,

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BEST AVAILABLE COPY

Nos. 84-495 and 84-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Supreme Court, U.S.
FILED
AUG 29 1985
JOSEPH F. SPANIOL, JR.
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RICHARD THORNBURGH, *et al.*,
Appellants

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*,
Appellees

EUGENE F. DIAMOND, *et al.*,
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On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits

BRIEF FOR THE NATIONAL ABORTION RIGHTS ACTION LEAGUE; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICANS FOR DEMOCRATIC ACTION; COALITION OF LABOR UNION WOMEN; COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS; DISABILITY RIGHTS EDUCATION AND DEFENSE FUND; NATIONAL BLACK WOMEN'S HEALTH PROJECT; NATIONAL CAMPAIGN TO RESTORE ABORTION FUNDING; NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC. OF THE UNITED STATES OF AMERICA; NATIONAL WOMEN'S CONFERENCE COMMITTEE; NATIONAL WOMEN'S HEALTH NETWORK; NATIONAL WOMEN'S POLITICAL CAUCUS; U.S. STUDENT ASSOCIATION; VOTERS FOR CHOICE; WOMEN'S EQUITY ACTION LEAGUE; WOMEN USA; AND YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE UNITED STATES OF AMERICA NATIONAL BOARD AS AMICI CURIAE IN SUPPORT OF APPELLEES

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IN THE

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On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits

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BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ABORTION RIGHTS ACTION LEAGUE, ET AL.

INTEREST OF AMICI

The NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL) is a national organization dedicated to keeping abortion legal, safe and accessible. It has more than 150,000 national members plus 33 affiliates with their own membership. NARAL spearheaded the May 1985 "Abortion Rights: Silent No More" action which gave voice to the millions of American women who have chosen to have abortions.

The AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW), a national organization of over

193,000 college educated women, is strongly committed to achieving legal, social, educational, and economic equity for women. AAUW has a longstanding commitment to ensuring a woman's right to choose to have an abortion as an essential element of her reproductive freedom.

AMERICANS FOR DEMOCRATIC ACTION (ADA) is an independent liberal organization, founded in 1947, which has members in every state. ADA policy, which is set by its members is that abortion is a personal and medical decision which should not be restricted by government action.

The COALITION OF LABOR UNION WOMEN is a membership organization which represents the interests of the 7 million union women in the United States. The right of a woman to control her own destiny, both economic and social, is seriously impaired if the state intervenes in this most personal of choices.

The COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS (CDRR), an issue committee of the Coalition for the Medical Rights of Women, is a grassroots organization based in San Francisco with 1000 members throughout California and several other states. CDRR believes that everyone has the right to make responsible, uncoerced decisions about parenting and sexuality, and this necessarily includes the right to choose abortion.

The DISABILITY RIGHTS EDUCATION AND DEFENSE FUND is a national disability civil rights organization dedicated to securing equal citizenship for disabled Americans. The right of disabled people to lead independent lives includes the right of disabled women to choose to have an abortion or to have children and to be free from involuntary sterilization.

The NATIONAL BLACK WOMEN'S HEALTH PROJECT is a health, education and advocacy organization which works to improve the quality of life for black women. Its work is based on the belief that black women,

including poor black women, should have access to health services which reduce infant mortality and produce healthy babies as well as access to abortion services so that black women have a full range of reproductive choices.

The NATIONAL CAMPAIGN TO RESTORE ABORTION FUNDING (NCRAF) is a newly developed national network reflecting the perspective of minority and working-class women. NCRAF seeks to guarantee abortion rights for all women through the restoration of Medicaid funding for abortion which was cut by the Hyde Amendment in 1976.

The NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUB'S INC. OF THE UNITED STATES OF AMERICA (BPW/USA), founded in 1919, has a membership of 150,000 individuals and 3500 local organizations, and represents the interests of working women. BPW/USA opposes any human life amendments, attempts to define when life begins and attempts to overturn *Roe v. Wade*.

The NATIONAL WOMEN'S CONFERENCE COMMITTEE (NWCC), 470 members appointed under Public Law 94-167 to implement the 1977 National Plan of Action, represents 90 national organizations and delegations from every state and territory. NWCC supports the implementation of the National Plan of Action plank on reproductive freedom.

The NATIONAL WOMEN'S HEALTH NETWORK (NWHN) is a public interest organization whose membership, comprised of 10,000 individuals and 400 organizations representing 500,000 women, seeks to give women a voice in the health care system in the United States. NWHN supports women's rights to have complete control over their bodies, which must include the right to make decisions to use contraception, to bear children or to end a pregnancy.

The NATIONAL WOMEN'S POLITICAL CAUCUS (NWPC), a bipartisan organization, with 77,000 members nationwide, seeks to increase the influence and number of women in the public policy process at every level. The NWPC fully supports reproductive freedom and in particular a woman's right to choose to have a safe and legal abortion.

The U.S. STUDENT ASSOCIATION (USSA) is a student advocacy service, representing over 3 million students and over 400 universities and colleges around the United States. USSA is in favor of a woman's right to choose and of reproductive freedom because an unwanted pregnancy can restrict a woman's access to higher education.

VOTERS FOR CHOICE (VFC) is a national independent pro-choice political action committee solely dedicated to keeping abortion safe, legal and accessible for all women. VFC's goal is to ensure the election of progressive, pro-choice candidates to Congress through provisions of financial and technical assistance.

The WOMEN'S EQUITY ACTION LEAGUE (WEAL) is a national membership organization committed to the economic development and advancement of all women. WEAL supports reproductive freedom as a right for all women, and recognizes that right as intimately tied to the capacity of women to gain economic security.

WOMEN USA is a communications network and organization serving women throughout the United States, and working to expand the participation of women in citizenship decision making. Women USA supports reproductive freedom as a fundamental human right as basic as freedom of speech and the press, and as important as the principal of separation of church and state.

The YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE UNITED STATES OF AMERICA (YWCA) National Board has supported, since 1967, the right of

women to choose abortion. The YWCA has one million members nationwide and 700 local branches.

SUMMARY OF ARGUMENT

Amici submit this brief to place the realities of abortion in women's lives before this Court and to urge this Court to reaffirm *Roe v. Wade*, 410 U.S. 113 (1973). Despite the narrow questions raised by the two cases before this Court, *Thornburgh v. American College of Obstetricians and Gynecologists*, 53 U.S.L.W. 3739 (U.S. Apr. 15, 1985) (No. 84-495) and *Diamond v. Charles*, 53 U.S.L.W. 3824 (U.S. May 20, 1985) (No. 84-1379), the Acting U.S. Solicitor General has filed an amicus brief asking this Court to overrule *Roe v. Wade*. The circumstances of women's lives and women's compelling reasons for choosing to have abortions elucidate the strong Constitutional foundations for this Court's decision in *Roe v. Wade*.

In addition to presenting social science and medical data, *Amici* present excerpts from some of the thousands of letters received in response to the national campaign "Abortion Rights: Silent No More."[1] As part of this action, people wrote letters describing why they or people they knew chose to have abortions. The letters came from people from all walks of life. Many writers described themselves in their letters:

> I am a Christian. I have a college degree and am a registered nurse. (L-40)

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[1] Some of the letters have been published. *See* 131 Cong. Rec. H3586-3602, E2367. 2372 (daily ed. May 22, 1985); 131 Cong. Rec. S6892-93, E2411-12 (daily ed. May 23, 1985); Detroit Free Press, July 7, 1985 (Sunday Magazine), at 6-11; Southern Feminist Press, July-August 1985, at 8-9; and others will be published in a book currently being negotiated by the National Abortion Rights Action League. For the Court's convenience the letters from which excerpts have been taken are reproduced in a volume lodged with this brief. Letters or documents which appear in this volume are designated as "L". The letters and excerpts have been quoted and reproduced as sent, without corrections in punctuation, grammar or spelling.

I am a 32 year old Black female. I am a Baptist by faith. . . . (L-41)

I was 30 years old, childless and facing a divorce. (L-42)

I was a nice Irish Catholic girl dating a nice Irish boy from Queens. (L-43)

I was born in Puerto Rico, and I grew up and went to school there . . . (L-26)

My name is Frank Mendiola, I am not an expert on abortion. . . . (L-4)

I have been married 38 years; I am the mother of 5 wanted and thoroughly loved children; grandmother of 3 . . . (L-2)

Then, I was a young lieutenant in the regular army. (L-20)[2]

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[2] Many who wrote wanted to share their personal experience but felt that they could do so only if they were able to preserve their privacy. Thus many of the authors signed only with a first name, a zip code or the pseudonym "Jane Roe" in honor of the plaintiff in *Roe v. Wade*. This Court has recognized that women may be deterred from asserting their rights if they are forced to make their abortion decisions public. This Court has found standing for plaintiffs who appeared pseudonymously, *see, e.g., Roe v. Wade*, 410 U.S. at 124; and *Doe v. Bolton*, 410 U.S. 179, 187 (1973), and has held that physicians have standing to assert the interests of their patients, in part because a woman may be deterred from asserting her own rights "by a desire to protect the very privacy of her decision from the publicity of a court suit." *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (opinion of Blackmun, J.). *See also, City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 440 n. 30 (1983).

The rise in clinic violence and harassment of women seeking abortions makes the need for privacy even greater. One letter writer explained: "I apologize for not signing my name but I'm not ready to be harrassed by the anti-choice people." (L-48) Another described the harassment she experienced: "One of the most difficult times that I had was when I arrived at the Clinic—only to be greeted by boisterous, uncaring and insensitive pro-life activists. These people taunted and harassed each individual who

While these letters do not constitute sworn testimony or record evidence, they do provide an invaluable source of information about the lives of women who choose to have an abortion. When abortion is examined in the context of women's lives, the constitutional foundations for a woman's right to decide "whether or not to terminate her pregnancy" become obvious. *Roe v. Wade*, 410 U.S. at 153. What also becomes clear is that this Court's decision in *Roe v. Wade* is firmly rooted in our nation's most fundamental traditions of personal integrity and human dignity.

ARGUMENT

I. *Roe v. Wade* Has Dramatically Improved The Lives And Health Of American Women And This Court Should Reaffirm It.

Approximately 1.5 million American women choose to have abortions each year. These women make this choice because they take their responsibilities to existing family members seriously; because they believe that they can escape from poverty; because they believe that an educa-

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went in." 131 Cong. Rec. H3588 (daily ed. May 22, 1985) (letter of Jane Doe). As of August 14, 1985, 145 incidents of clinic violence had been reported in 1985 alone. National Abortion Federation, Summary of Clinic Violence As Reported to N.A.F. (1985). The violence and harassment have been so severe that courts have issued injunctions and restraining orders against individuals engaging in activities that interfere with access to and the use of private property for the provision of abortion services. *See, e.g., Northern Virginia Women's Medical Center v. Balch*, 617 F.2d 1045 (4th Cir. 1980) (trespass upon clinic facility and immediately surrounding property); *Feminist Women's Health Center v. Women Exploited by Abortion*, No. 83-2-04152-8 (Wash. Super. Ct., Snohomish Cty. 1984) (formation of a "gauntlet" which patients must cross, recording patients' license plates, video-taping and photographing patients); and *Parkmed Co. v. Pro-Life Counseling, Inc.*, 88 A.D. 2d 534, 450 N.Y.S. 2d 23 (1982) (physical and verbal abuse, harassment, intimidation and assault of clinic patients and employees and property damage). For additional cases, see Reproductive Freedom Project of the ACLUF, *Legal Docket* (L. Soto ed. 1984).

tion is important; because they believe that they have talents and skills to offer the world; because they believe that someday they will find the right man to marry and raise a family with; and because they have hopes and dreams of better lives for themselves and those they love. The reasons why women choose abortion are numerous, personal and profound. This Court's decision in *Roe v. Wade* has preserved to women the right to make these critical and highly personal decisions.

In his brief, the Solicitor General asks this Court to overrule *Roe v. Wade* and "return the law to the condition in which it was before that case was decided." Brief for the United States as *Amicus Curiae* in Support of Appellants, at 24 ("S.G. Br."). The condition of the law determines the condition of women's lives. The condition to which the Solicitor General would return us is one in which hundreds of women will die each year from illegal abortions and thousands will have to risk their lives or be forced to endure unwanted pregnancies.

Before this Court's decision in *Roe v. Wade*, state governments were free to substitute their political judgments for the personal, moral judgments of women and the medical judgments of doctors. Despite the laws that prohibited or restricted abortion, women made decisions about their reproductive lives, and obtained the abortions they needed and wanted. *See* W. Hern, *Abortion Practice* 17-20 (1984). *See also* M. Potts, P. Diggory, & J. Peel, *Abortion* 87-89 (1977). Women obtained illegal abortions despite the illegality and grave risks involved, as these excerpts from the letters reveal:

> I remember Tijuana. I remember bugs crawling on walls as I waited for the "second part" of my abortion to take place. The first part was done in comparatively clean surroundings—"a clinic"—but I was too far along for the abortion to be done in one procedure, so I was sent to a "hotel" to wait three hours—a stinking cesspool of urine, sweat, filthy sheets and bugs—unidentifiable crawling creatures

all over the walls, floors and crevices. . . . Where else could I have gone in 1963? A name from a hairdresser passed through the underground grapevine by other desperate women seeking a life of dignity and choice. (L-1)

I think the thing I will always remember most vividly was walking up three flights of darkened stairs and down that pitchy corridor and knocking at the door at the end of it, not knowing what lie behind it, not knowing whether I would ever walk back down those stairs again. More than the incredible filth of the place, and my fear on seeing it that I would surely become infected; more than the fact that the man was an alcoholic, that he was drinking throughout the procedure, a whiskey glass in one hand, a sharp instrument in the other; more than the indescribable pain, the most intense pain I have ever been subject to; more than the humiliation of being told, "You can take your pants down now, but you shoulda'—ha!ha!.—kept 'em on before;" more than the degradation of being asked to perform a deviate sex act after he had aborted me (he offered me 20 of my 1000 bucks back for a "quick blow job"); more than the hemorhaging and the peritonitus and the hospitalization that followed; more even than the gut-twisting fear of being "found out" and locked away for perhaps 20 years; more than all of these things, those pitchy stairs and that dank, dark hallway and the door at the end of it stay with me and chills my blood still.

Because I saw in that darkness the clear and distinct possibility that at the age of 23 I might very well be taking the last walk of my life; that I might never again see my two children, or my husband, or anything else of this world. (L-2)

Or, women found ways to obtain a legal abortion despite the restrictions, the delay and the subterfuge involved:

> Having an abortion in Illinois in 1957 was a demeaning experience. I had to lie, two doctors who did not know me had to lie, and my own doctor had to lie. Such were the laws in that time and at that place. No matter that I had had a miscarriage one month previously, and my uterus looked like chopped liver, and I was in a great deal of pain; we still had to go through this hypocritical process to enable me to have my own doctor, at the hospital of my choice. (L-3)

Estimates of illegally induced abortions in the United States in the 1960's ranged between 200,000 and 1,200,000 a year. Cates, *Legal Abortion: The Public Health Record*, 215 Science 1586 (1982). Illegal abortions caused large numbers of deaths. In 1965, for example, 235 or 20 percent of all deaths related to pregnancy and childbirth were attributed to abortion. *Id.* Thus, many women who obtained illegal abortions did not survive:

> On November 18, 1971, my twin sister Rose Elizabeth, died from an illegal abortion. This was after a very brutal rape . . . The traumas of being raped and pregnant, knowing she would die if she didn't have an abortion, the embarrassment, the pain, the guilt. She called a close friend who knew of a person who would do the abortion. She decided to wait until we all had left for church, then called her friend to pick her up, (I can still remember opening the door of that old half abandoned building, and seeing her laid out on the table bleeding to death.) She never made it out alive . . . For this reason I speak out today, for I believe if there had been a place where women, especially young women, could have gone for an abortion, where the environment was safe and clean, Rose Elizabeth, would still be with us today. (L-4)

Those women who did survive their abortion were likely to suffer complications: [3]

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[3] "Illegal abortions performed by unskilled practitioners in unsafe settings had complication rates much higher than legal abortion

> Becoming pregnant just two months after the birth of her first child, [my mother] was not well recovered from this experience. Her doctor was concerned for her health, but in 1940 there were no options. She and my father chose to abort this child, fearful her health was too fragile to manage another pregnancy so soon. Done by a backstreet butcher, the abortion put my mother's life in jeopardy and led to complications which nearly killed her during her pregnancy with me a few months later. She and I were in the hospital for 21 days following my birth and her health was permanently ruined. She underwent a hysterectomy by the age of 30 and has had two spinal fusions to attempt to repair the damage done to her body because of her pregnancies. (L-5)

Some women who did not or could not obtain abortions resorted to suicide:

> This is not a letter about an abortion. I wish it were. Instead, it is about an incident which took place over forty years ago in a small mid-western town on the bank of the original "Old Mill Stream". One night a young girl jumped off the railroad bridge to be drowned in that river. I will always remember the town coming alive with gossip over the fact that she was pregnant and unmarried. . . I could imagine the young girl's despair as she made her decision to end her life rather than face the stigma of giving illegitimate birth. . . I still grieve for the girl. (L-6)

Laws prohibiting abortion forced women to undertake the significantly greater risks of pregnancy and child-

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today. Because the number of illegal abortions performed in a given locale was unknown, case-series reports of complications do not allow calculation of complication rates. Sepsis . . . was a major problem that has virtually disappeared today. Complications were related to ineffective or unsafe methods, ranging from oral ingestion of turpentine, bleach or quinine to insertion of foreign bodies into the uterus." Tyrer, *Abortion in the U.S.: Past, Present, and Future?*, PPFA Medical Digest: Issues in Reproductive Health 3 (Spring 1982) (footnotes omitted).

birth. *See Roe*, 410 U.S. at 149, 163.[4] Some women died as a result of pregnancy or childbirth and others came close to death because of restrictive abortion laws:

> Early in her pregnancy, she began experiencing some bleeding and was treated by her doctor and sent home. Patricia seemed to be pregnant; she was also tired and not feeling well. Then, about two months later, she began bleeding again and was carefully attended by her doctor. Within five days she was in excruciating pain which her doctor diagnosed as peritonitis. Although her doctor said he had never been able to detect any fetal development, Patricia had to wait for further tests to be completed to show that there was no viable fetus. Then, her doctor could legally perform a D & C and remove the remains of a fetus that had been dead several months. The anti-abortion laws of the time nearly cost Patricia her life and did cause her months of pain and inconvenience for her young family. (L-7)

Without access to legal abortions, women were forced to undergo not only the physical burdens and risks, but also the pain and indignity of unwanted pregnancies:[5]

> I am a fifty-three-year-old librarian—middle class, Unitarian—and to all who know me, the mother of two. In fact, I am a mother of three, having had a child out of wedlock which, until recently, I have

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[4] Legal abortion is safer than pregnancy through at least the first 16 weeks of pregnancy. And for pregnant teenagers "abortion is at least five times safer with respect to survival than term pregnancy." Hern, *supra*, at 26. "In 1978, the overall death-to-case rate for legally induced abortions fell to 0.5 per 100,000 abortions, whereas the death-to-case rate for term delivery resulting in live birth, excluding abortion and not including deaths due to ectopic pregnancy, molar pregnancy, and fetal deaths, was 8 per 100,000 live births, making the risk of death due to pregnancy 16 times greater than the risk of death due to abortion." *Id.* at 24.

[5] *See* Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569, 1579-80 (1979) for an excellent summary of the physical burdens of pregnancy.

never felt able to mention to anyone for over thirty years. The fear, pain and powerlessness of an unsanctioned pregnancy, and the immeasurable anguish to living the remainder of one's life knowing somewhere there is a child irrevocably lost to you, is an experience no woman should have to undergo. When I remember—and believe me, this is something one never forgets—my devastated father weeping over the news, the subterfuge and strategy involved in spiriting me out of sight, the lonely wait in a strange city, and the birth alone amongst strangers, completely devoid of the joy which should rightly accompany this event, the pressure to relinquish my daughter for adoption, then the time of agonizing readjustment, which phased into acceptance but left a never-totally assuaged sense of loss. . . . As a nineteen-year-old college freshman in 1951, I would have given anything imaginable to have had access to legal abortion—to have spared my parent (and I was fortunate in having a loving, supportive one) the hurt this event caused him, and to have spared myself the incalculable emotional pain and the subtle ways in which my life was altered forever. (L-8)

When I was only 16 years old, in 1968, I found myself faced with an unplanned and an untimely pregnancy. Abortions were illegal at that time and I did not have the money or resources to know how to go about getting one way or any other way. When I finally got up the nerve to tell my parents I was almost 4 months into the pregnancy. It was at this time that I felt the impending doom of my situation. I was forced to carry the pregnancy to term. During my pregnancy I was treated like a baby machine —an incubator without feelings—who was to produce this child for adoption for another couple who could not have children, for whatever reasons. (L-9)

Today, because of this Court's decision in *Roe v. Wade*, most women have access to safe and legal abortions.[6] Once legalized, abortion became one of the safest surgical procedures performed, as well as one of the most studied and best understood. *See* Cates, 215 Science, at 1586; Hern, *supra*, at 23-34.[7] In the ten years following *Roe*, the replacement of unintended births and illegal abortions by legal abortions has averted perhaps 1,500 pregnancy-related deaths and several tens of thousands of life threatening complications. Tietze, *The Public Health Effects of Legal Abortion in the United States*, 16 Family Planning Perspectives 26 (1984). The differences between seeking an illegal abortion before *Roe* and a legal one after *Roe* are dramatic:

> I am 38 years old and have had 2 abortions—1 legal, 1 illegal. My first was when I was 19 years

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[6] However, many instances exist where women, either poor, young, or from rural areas, do not have access to safe and legal abortion services. These women face conditions not unlike those prior to *Roe v. Wade*. Due to the public funding cutoffs from the Federal government and 35 states, poor women face a delay of two to three weeks, the time needed to acquire adequate funds, in obtaining an abortion. This delay causes some poor women to face riskier second, instead of first trimester abortions. Poor women may also sacrifice current living expenses for abortion services. Henshaw & Wallisch, *The Medicaid Cutoff and Abortion Services for the Poor*, 16 Family Planning Perspectives 170 (1984). *See also* R. Petchesky, *Abortion and Woman's Choice*, 155-61 (1984). Teenagers face "a serious, and in some cases insurmountable barrier" to abortions in states with parental consent or notification laws, especially teens in rural areas. Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Family Planning Perspectives 259 (1983). Seventy-four percent of all non-metropolitan women live in counties that have no abortion facilities. Henshaw, Forest and Blaine, *Abortion Services in the United States 1981 and 1982*, 16 Family Planning Perspectives 119, 122-23 (1984).

[7] Abortion procedures have "half the risk of death associated with tonsillectomy and one one-hundredth the risk of death associated with appendectomy." Hern, *supra*, at 23-24.

> old. It was illegal. I had to drive from north Jersey to Philadelphia for what I understand now was an ineffective treatment by a doctor who sexually abused me while supposedly giving me injections to induce a miscarriage. After a week of treatments (64 injections a day) he used a scalpel to rupture the opening of my uterus. I miscarried later that day. I was too frightened to go to the doctor and developed peritonitus. I almost died.
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> My second abortion was legal. When I discovered I was pregnant, I went to my doctor, who, with much concern and sympathy, told me of all alternatives, including adoption. We both decided abortion would be best. The procedure was done in a hospital—it took three hours and I was back to work the next week. There was no trauma, other than the difficulty of making a decision that is always hard to make. (L-10)[8]

Overturning *Roe v. Wade* would cause grave damage to women's health and lives. If *Roe* were overturned and abortion prohibited or restricted, it is estimated that approximately 200 women would die each year from complications from abortions. Tyrer, *supra*, at 4. Experience in countries whose governments repealed liberal

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[8] There are many reasons why a woman would have more than one abortion. For example, the author of the letter quoted above explains:

> By the way—I am allergic to rubber and the contraceptive creams and jellies. I cannot take birth control pills and rejected an IUD. I am as careful as I can be but the only alternative my husband and I now see is sterilization. (L-10)

Another author writes:

> I have had two abortions and in each case I felt the decision was the most loving one I could make for myself, the unborn child, our family and the larger community. The first decision was made because I had contracted measles shortly after conception. My husband and I already had four children . . . The second abortion decision was made because of failed contraception. (L-11)

abortion laws indicates that women continue to obtain abortions and that there is an increase in the number of deaths due to the dangers of illegal abortions.[9] If a woman's right to choose to have an abortion is not constitutionally protected, states might pass laws that are even more stringent than those that existed before this Court's decision in *Roe v. Wade*.[10] For example, states which once allowed abortions for pregnancies that threatened the life or health of the mother might not include these exceptions and women and doctors might be prosecuted for violating laws prohibiting or restricting abor-

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[9] The experience in Romania should be instructive for the United States. From 1957 until 1966 Romania had a liberal abortion law; subsequently access to abortion services and contraceptives was restricted. Initially the birth rate nearly doubled and the abortion ratio (to 1000 live births) fell over 90%. David, *The Romanian Abortion Experience: New Data*, Intercom 7 (Sept. 1980). However, the abortion rate since 1966 increased steadily, representing spontaneous and induced abortions under all circumstances. Concurrently, deaths to women from abortion rose dramatically, implying a steady increase in non-medically-induced abortions. Huber, *Restricting or Prohibiting Abortion by Constitutional Amendment: Some Health Implications*, 27 Journal of Reproductive Medicine 729, 733 (1982). The abortion ratio continues to steadily rise from 390 (1967) to 1300 (1983). *Monitoring to Prevent Abortion in Romania*, Population Today 8 (June 1984). *See also*, Potts, Diggory, and Peel, *supra*, at 143-46.

[10] The Helms-Hogan constitutional amendment to overturn *Roe v. Wade* would have prohibited abortions, even those which save the life of the woman. Pilpel, *The Fetus as Person: Possible Legal Consequences of the Hogan-Helms Amendment*, 6 Family Planning Perspectives 6 (1974). Over 45 bills proposing constitutional amendments to prohibit abortion have been introduced in Congress since 1973. Seventeen were introduced in the first three months of 1981 alone. Huber, *supra*, at 730. One sponsor, "Sen. Hatch has stated publicly on numerous occasions that if his amendment is adopted he would be 'among those seeking the most restrictive state and federal laws with respect to abortion'." The Alan Guttmacher Institute, *The Hatch Amendment: Abusing the Process, Invading Privacy*, 2 Issues in Brief 1, 2 (1982).

tion more vigorously than before this Court's decision in *Roe v. Wade*. Huber, *supra*, at 732-33.[11]

No sound reasons exist for this Court to overturn *Roe v. Wade* and put in jeopardy the lives and health of American women. By allowing women to make critical personal decisions regarding pregnancy and childbirth and by allowing health care providers to deliver the best possible abortion services, this Court struck the appropriate balance between state and individual interests. Measured against the dramatic improvement that legalized abortion has brought to American women, *Roe v. Wade* is anything but "flawed." S.G. Br. at 2, 24.

II. To "Return The Law To The Condition" Before *Roe* Would Deny Women Their Fundamental Constitutional Rights.

The Constitutional basis for *Roe v. Wade* is found in the personal liberty guranteed by the Fourteenth Amend-

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[11] Enforcement of laws prohibiting abortion, like laws prohibiting the use of contraceptives, would be "virtually impossible without the most outrageous sort of governmental prying into the privacy of the home." Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 930 (1973) (emphasis omitted). In the absence of legal abortions women will perform self-abortions in their homes and in their bedrooms:

> On Saturday night [my husband] went out to get some gas for his old car. I decided to abort myself. I cleaned a 14-inch knitting needle with alcohol, lay on my bed, prayed and slowly inserted it into myself. I knew I could die if I pierced my womb and bled and/or became infected. I felt I had to risk it. As I drew out the needle there was a little blood on it and I was very afraid. I will always remember that red fluid on the end of that shiny blue needle . . .(L-47)

If *Roe v. Wade* was overturned even more outrageous intrusions might be permitted. In Romania, for example, where liberal abortion laws were repealed, the government announced a program which includes mandatory medical screening of women in their 20's for pregnancy and monitoring of pregnant women to ensure the pregnancy continues. The government stated that miscarriages would be investigated, and any illegal abortions would result in prison terms for both the woman and the physician. *Monitoring to Prevent Abortion In Romania*, Population Today, at 8.

ment, in the Bill of Rights and its penumbras, and is manifest in the stories of American women trying to lead meaningful, responsible, and caring lives. In *Roe v. Wade* this Court held that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. This decision stands on the long-recognized and essential element of personal liberty—an "individual's 'freedom of personal choice in matters of marriage and family life'." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 (1983).[12] The right to choose to have an abortion is so personal and so essential to women's lives and well-being that without this right women cannot exercise other fundamental rights and liberties guaranteed by the Constitution.

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[12] The Solicitor General dismisses personal liberty as a constitutional foundation for *Roe v. Wade* and argues that the right to choose rests on nothing more than "conviction" that is "at best intuition based in controversial moral and social theories of the good life and of an individual's situation in society . . ." S.G. Br. at 29. When taken out of context many constitutionally protected activities seem to rest on little more than "theories of the good life": watching movies at home, *Stanley v. Georgia*, 394 U.S. 557 (1969); drinking 3.2 beer, *Craig v. Boren*, 429 U.S 190 (1976); attending private school, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); living with grandchildren, *Moore v. East Cleveland*, 431 U.S. 494 (1977); wearing a particular jacket, *Cohen v. California*, 403 U.S. 15 (1971); attending a particular college, *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); working in the laundry business, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); studying a foreign language, *Meyer v. Nebraska*, 262 U.S. 390 (1923); strolling on a neighborhood street, *Kolendar v. Lawson*, 461 U.S. 352 (1983). When placed in context and given careful consideration, these activities which "'may seem at first blush . . . inconsequential" turn out to raise significant constitutional questions. *Cohen v. California*, 403 U.S. at 15. This is so, of course, because the Constitution protects more than life as mere physical existence. The Constitution protects the liberty to live a meaningful and fulfilling life.

The rights to privacy and personal liberty have been explicitly recognized to include the right to use contraceptives. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See also Carey v. Population Services International*, 431 U.S. 678 (1977). Women are fertile from, approximately, the age of 15 to 45. Hern, *supra*, at 2-3. Most women will spend the majority of these 30 years trying not to get pregnant. The Alan Guttmacher Institute, *Choosing A Birth Control Method That's Right For You*, at 2. But no contraceptives are one hundred percent safe and effective [13] and they often fail despite conscientious use:

> I was a married woman using the birth control methods available at the time; a diaphragm and a spermicide jelly. My first child was planned and I was very happy. Slightly more than two years later I had another planned child. Then I found myself pregnant with a child that would be only 17 months younger than the second child. I had used my birth control methods assiduously but to no avail. I accepted the fact of that child and loved it. Then I got pregnant again. This one would be only 13 months younger than the third child. I was faced with the unpleasant fact that I could not stop the babies from coming no matter what I did . . . [The abortion] was a tremendous relief and I have never regretted it. My husband then had a vasectomy and our sex life was immensely improved. You cannot possibly know what it is like to be the helpless pawn of nature. I am a 71 year old widow. (L-12)

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[13] Petchesky, *supra*, at 182. Moreover, the development of a completely safe and one hundred percent effective contraceptive is practically impossible given the inherent danger of contraceptive technologies to women's bodies. *Id.* at 189-90. The lowest possible risk to women's health is experienced by women using barrier methods of contraception backed up by early abortion to terminate pregnancies from method-failure. Tietze, *New Estimates of Mortality Associated with Fertility Control*, 9 Family Planning Perspectives 74, 76 (1977).

> My attitude about abortion changed dramatically when, with my third child, then six, in school full time, my business booming, and my own college career proving exceedingly fulfilling, I suddenly began experiencing signs of pregnancy. At this time my husband and I had a birth control agenda more complex than a NASA countdown, so I was both puzzled and anguished by the failure of the most effective contraceptive technology ever devised. (L-13)

> My husband and I take our responsibility to our children and any potential children seriously. I take no chance with my contraception except its own failure rate. And any of them can fail. I hunger for a time when this will stop, when we can know and not simply assume that our plans to prevent conception will work. But until that time we must have the right to choose, either to abort or to give birth. Without that choice we love in the shadow of fear. (L-14)

Because contraceptives fail, and because they are not always available or possible to use, abortion is necessary if people are to be able to determine whether and when to "bear or beget a child." *Eisenstadt*, 405 U.S. at 453.[14]

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[14] Sometimes contraceptive use before intercourse is impossible, as in situations of rape and incest. Some women do not use contraceptives, in particular the pill and IUD, based on their knowledge of the risks to life and health associated with usage. Petchesky, *supra*, at 182-88. Other times ignorance and societal pressures account for the failure to use contraception, especially among teens. As one letter writer explained, "I got pregnant when I was 14. I didn't even know I had engaged in 'the' sexual act." (L-17) *See also* Jones, *et al.*, *Teenage Pregnancy in Developed Countries: Determinants and Policy Implications*, 17 Family Planning Perspectives 53 (1985). Access to contraceptives is restricted, especially for teenage and poor women, because of the cost and state regulation of advertising and access. H. Ory, J. Forrest, and R. Lincoln, *Making Choices: Evaluating the Health Risks and Benefits of Birth Control Methods*, 21, 25 (1983). Furthermore, "[a]lmost all women who were not using a method of contraception

Individuals and couples choose the alternative of abortion so they can start or expand their families when they feel most ready and able to care for them. The following letters illustrate how important the right to choose to have an abortion is to those who are or intend to be parents:

> . . . We write together because abortion affects the lives of men and women . . . Our decision was not a difficult one. It was not an agonizing one or a resolution of ambivalence. In contrast our decision was a clear one. We were not ready to have a child . . . Six years later our daughter, now almost three, was willfully conceived. It is difficult to adequately describe the difference between a wanted and an unwanted pregnancy. It is sometimes like the difference between darkness and despair, and light and joy. We were ecstatic. The absolute joy we experience through our daughter comes in large part because we were ready to become parents. She has certainly been worth waiting for. (L-15)

> Now, I am proud to say, I am 6 months pregnant and very excited. We are both looking forward to a child, confident that we are up to meeting this challenge. Things are so different than 5 years ago—now this child will be a wanted child and will come into a loving family waiting for it with open arms. Now we are both ready to give our lives to this new being—before we would have felt robbed. (L-16)

> I am and will forever be grateful that safe and legal abortion was available for both my daughters. Each had a time when she needed to have that choice open to her.

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before an abortion use one after an abortion." The Alan Guttmacher Institute, *Responses to Concerns Raised About Abortion*, 3 Issues in Brief 1, 2 (1983). *See also* Westoff, *et al., Abortions Preventable by Contraceptive Practice*, 13 Family Planning Perspectives 218, 221 Table 3 (1981) (96.8% of women having an abortion use some form of contraceptive after the procedure).

> Each found herself pregnant at a time when it seemed she may not have had the resources to raise a child to a compassionate, responsible adulthood. . .
>
> One daughter did much soul-searching and exploration of options, possibilities and consequences in making her decision. She decided not to have the child. It was a good decision. Her health and the conditions of her life have been such that it would have been tragic for a child. She was at a point in her life where she did not have the strength to give what a baby and growing child needs; nor even to go through a pregnancy.
>
> My other daughter also considered very deeply what having a child at that point in her life meant. Having the choice of ending the unplanned pregnancy gave her and her husband the opportunity to think through together what becoming parents needs to mean. They made a conscious commitment to raising that child. Their decision has turned out to be right for all concerned. June 5 will be that beautiful child's seventh birthday. (L-18)

The excerpts from the letters illustrate that the right to choose to have an abortion is also an indispensable part of other liberty interests recognized by this Court. This Court has stated that the right to "[l]iberty means more than freedom from servitude, and the constitutional guarantee is an assurance that citizens shall be protected in the right to use [their] powers of mind and body in any lawful calling." *Smith v. Texas*, 233 U.S. 630, 636 (1914).

One of this Court's most eloquent explications of the right to liberty is in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), where this Court stated:

> Without doubt [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship

> God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Without the right to choose abortion the Fourteenth Amendment's guarantee of liberty has little meaning for women. With the right to choose abortion, women are able to enjoy, like men, the right to fully use the powers of their minds and bodies. This becomes clear when people reveal why they choose to have an abortion. These reasons correspond to the very same rights and freedoms celebrated in *Meyer*.

"To engage in any of the common occupations of life": [15]

The following letters reveal that women choose to have an abortion because pregnancy and childbirth can prevent them from keeping their jobs, from feeding their families and from serving others in ways they consider necessary and appropriate.

> My job on the assembly line at the plant was going well and I needed that job desperately to support the kids. Also I had started night school to improve my chances to get a better job. I just couldn't have another baby—5 kids were enough for me to support.
>
> I felt badly for a day or two after the abortion. I didn't like the idea of having to go thru with it. But it was the right thing for me to do. If I had had the baby I would have had to quit my job and go on welfare. Instead I was able to make ends meet and get the kids thru school. (L-19)

> Thirty years later I feel that I made the right choice in having an illegal abortion. I was able to pursue a useful and rewarding career in the service of my country that would not have been possible, if I had born a child. (L-20)

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[15] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

> To this day I am profoundly grateful for having been able to have a safe abortion. To this day I am not a mother, which has been my choice. I have been safe and lucky in not becoming pregnant again. I love people and work in a helping profession which gives me much satisfaction. (L-21)

"To acquire useful knowledge": [16]

Pregnancy and childbirth may determine whether a woman ever gets to start or complete her education, which in turn will significantly influence her ability to support herself and her family.

> Being a mother is hard at any age but being a teenager makes it harder . . . Things I may have wanted to do before getting pregnant, like college and a career are different now. Before I think about my dreams, I have to think about taking care of a baby . . . I could be making plans for my future, but instead I'm making plans for my baby's future. (*Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. (May 7, 1985) (Statement of Monica Woodruff). (L-45)

> I am a junior in college and am putting myself through because my father has been unemployed and my mother barely makes enough to support the rest of the family. I have promised to help put my brother through when I graduate next year and its his turn. I was using a diaphragm for birth control but I got pregnant anyhow. There is no way I could continue this pregnancy because of my responsibilities to my family. I never wanted to be pregnant and if abortion were not legal I would do one on myself. (L-22)

> I had completed one year of a two year X-ray technician program when I discovered I was preg-

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[16] *Id.*

> nant. I was 20 years old, the year was 1971, and abortion was illegal. I wanted to finish my training and I knew that I did not want a child. (L-23)

"To Marry": [17]

Women choose to have an abortion because they want to wait until they can marry for sound, loving reasons.

> I had an abortion in 1949 because I could not go through with a loveless marriage for the sake of a child I did not want. . . . The benefits were incalculable. I was able to terminate the pregnancy, to complete my education, start a professional career, and, three years later marry a man I did love. We subsequently had three beautiful children by choice, children who were welcomed with joy, cherished always, and raised with deep pleasure because we attained economic security and the maturity necessary to provide properly for them. (L-29)

> I am now 28, a registered Professional Engineer in California, and still with the same man I was 6 years ago. In many ways, the abortion brought us closer together; whereas an unwanted child would have forced us together unwillingly or driven us apart. . . . (L-31)

To "establish a home and bring up children": [18]

The availability of abortion makes it possible for people not only to choose the number of children they want, but also to create the kind of family life they have envisioned for themselves, to meet their responsibilities to already existing family members, and to raise their children according to their values. *Cf. Moore v. East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Prince v. Massachusetts*, 321 U.S. 158 (1944).

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[17] *Id.*

[18] *Id.*

When I found out I was pregnant, quite a few years ago, I had my two boys to care for, and Norma, a baby girl. I already had all that I could handle, because my third child, our daughter was a spina bifida baby, and I had made a promise to myself, when she was born with this condition, that I would take care of her until the end. I knew that such a baby will live two or three years at the most [19] and I had a choice: I could place Norma in a hospital, or I could take care of her at home. I felt I owed it to my special baby to see she had the care she needed. . . . If I had not had that abortion, I would have been pregnant at the time I buried Norma, and I think I would have gone to pieces . . . I did not believe that it was God's intention that I should have a fourth child, because I knew that it would break me and my family too. (L-26)

As for adoption, I very much respect those women having gone that route. It is truly a selfless act of love. But for myself, I knew if I was to have a baby, I would want to keep it. Envisioning what my life would be, an unskilled, unwed mother, my child would not have two parents but one working parent. That's not the life I wanted to give my child and not what I wanted myself . . . Now almost ten years after, I am married and a full-time mother of two. When we first heard my son's fetal heartbeat I cried tears of joy. Our children were wanted very much and my fantasy is now my life. (L-27)

I am sole support of three children because my husband left three years ago with another woman. He does not pay child support and cannot be found to force him. I have a very hard time trying to do

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[19] It should be noted that "most [spina bifida babies] now survive and can anticipate meaningful lives." D. McLane, *Introduction to Spina Bifida* (1984).

it myself. I just got a new job that pays better, but I still don't have benefits yet. If I have another baby I'll have to go back on welfare and I hate to do that because it does not set a good example for kids. (L-28)

Ten years ago when abortions were illegal I was in a situation that would seem unbelievable on a soap opera. My husband was about to go to Vietnam as a physician. I had three children under the age of five, my mother was dying of a brain tumor diagnosed the week that my husband got his orders, my father had been earlier diagnosed as having leukemia, and my younger sister was within a year of getting married. I consider myself capable of handling most situations but on top of this I found myself pregnant. My first obligation was to my husband and my children but I felt a strong obligation to my parents as well. I simply did not feel I could or should cope with another baby. I was thirty years old. (L-25)

"To worship God according to the dictates of his own conscience": [20]

The decision to have an abortion often reflects or is motivated by religious or spiritual beliefs that place priority on service and conduct of life as values even higher than procreation.

Having an abortion seemed to be the most thoughtful and loving decision we could make, in fact, it seemed to be the only decision we could make which would still maintain our life goals and plans in helping serve others as we had hoped. I was a Christian then, as I am now, and constant prayer asking for guidance through peace is how I was able to feel that God guided me toward that decision, also. Since the abortion in 1977, I have helped hundreds of emotionally disturbed children, counseled twice as many parents about the loving ways of parenting, become

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[20] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

known as the expert in the field of counselling children and families traumatized by sexual abuse, and in 1979 I married a Pediatrician who has been a wonderful husband and father to our four year old boy and our seven month old boy in utero (due in August.) God has given me many blessings and much peace since 1977. . . . (L-32)

I could not see carrying a child to term at my age, and then giving it up for adoption . . . Being Jewish, our teaching is that the child becomes a full-fledged person only when it takes the first breath. Until then it does not have "human" standing. I went with what I felt to be spiritually, morally, and economically just. (L-33)

"And generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men": [21]

This Court has stated that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraints or interference of others." *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891). If a woman cannot choose to terminate an unwanted pregnancy, she is denied the right to the "possession and control" of her own body.

Today I am a little more than two months pregnant. My husband and I are thrilled about it. Almost exactly a decade ago, however, I learned I was pregnant, and my response was diametrically opposite. I was sick in my heart and I thought I would kill myself. It was as if I had been told my body had been invaded with cancer. It seemed that very wrong. (L-34)

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[21] *Id.*

> It was not easy for me to write this letter, even though I am a Family Planning Professional and with all my knowledge of family planning; I was like any other woman who had an unintended pregnancy, I was terrified and felt as though my life was out of my control. (L-35)

> I was furiously angry, dismayed, dismal, by turns. I could not justify an abortion on economic grounds, on grounds of insufficient competence or on any other of a multitude of what might be perceived as "legitimate" reasons. But I kept being struck by the ultimate unfairness of it all. I could not conceive of any event which would so profoundly impact upon any man. Surely my husband would experience some additional financial burden, and additional "fatherly" chores, but his whole future plan was not hostage to this unchosen, undesired event. Basically his life would remain the same progression of ordered events as before. (L-13)

The letters make plain that what is at stake is nothing less than a woman's right to control her life and her destiny:

> On the ride home from the clinic, the relief was enormous. I felt happy for the first time in weeks. I had a future again. I had my body back. (L-36)

> Personally legal abortion allowed me the choice as a teenager living on a very poor Indian Reservation to finish growing up and make something of my life. (L-37)

> I was not glad that I was faced with an unwanted, unplanned pregnancy, however I am glad that I made the decision to have an abortion. The experience was a very positive one for me. It helped me learn that I am a person and I can make independent decisions. Had I not had the abortion I would have probably ended up a single mother struggling for survival and

> dealing with a child that I was not ready for. Or trapped in a relationship with an abusive, uncaring man. I would have felt inadequate as a mother and a person. (L-38)

> I cannot stress strongly enough how that one personal decision allowed me to control my life. (L-39)

As the excerpts from the letters make clear, the freedom to decide whether or not to terminate a pregnancy is intimately connected to a woman's ability to be a full and equal participant in this society. Without the right to choose to have an abortion, women are not free to make and carry out fundamental, life-shaping decisions about work, education, marriage, family, home, health, and happiness. In short, without the right to choose to have an abortion, women are denied their constitutional rights of privacy and personal liberty.

Recognizing the profoundly personal nature of the abortion decision, this Court restricted government intrusion into the intimate relations of husbands and wives, into the family and into the hearts and minds of American women struggling to lead lives of integrity and dignity. *Roe v. Wade*, 410 U.S. 113 (1973). This Court's decision in *Roe v. Wade* has dramatically improved the lives and health of American women and protected a right that is both fundamental and indispensable to women's ability to lead full and meaningful lives.

CONCLUSION

For the foregoing reasons, this Court should reaffirm *Roe v. Wade* and affirm the orders of the U.S. Court of Appeals for the Third Circuit in *Thornburgh v. American College of Obstetricians and Gynecologists* and the U.S. Court of Appeals for the Seventh Circuit in *Diamond v. Charles*.

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Nos. 84-495 and 84-1379

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, *et al.*,
Appellants

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,
Appellees

EUGENE F. DIAMOND, *et al.*,
Appellants

v.

ALLAN G. CHARLES, *et al.*,
Appellees

On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits

---

BRIEF *AMICI CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AND THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

Amici American Medical Association, *et al.*, will address the following issues:

1. Whether Pennsylvania impermissibly infringes the woman's right of privacy by requiring her physician to communicate to her a specified litany of information concerning abortions and the abortion procedure.

2. Whether Illinois impermissibly infringes the woman's right of privacy by requiring her physician to inform her that a prescribed method of birth control causes "fetal death."

3. Whether Pennsylvania impermissibly infringes the woman's right of privacy by requiring her physician to disregard the emotional and psychological effects of the abortion technique on the woman and to select the technique that provides the fetus with the greatest chance of survival, even though that technique may pose a greater health risk to the woman.

4. Whether Illinois impermissibly infringes the woman's right of privacy by imposing criminal sanctions on a physician for failure to comply with a vague standard of care to protect a fetus based on either the "possibility" that a fetus is viable or that a fetus is "known to be viable."

5. Whether Pennsylvania's "second-physician" requirement for post-viability abortions contains a sufficiently clear emergency exception to comply with this Court's holding in *Ashcroft* v. *Planned Parenthood*, 462 U.S. 476 (1983).

6. Whether Pennsylvania impermissibly infringes the woman's right of privacy by requiring her physician to supply the State with reports concerning every abortion, which include descriptions of the bases for certain medical judgments.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-495

RICHARD THORNBURGH, *et al.*,
Appellants

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,
Appellees

No. 84-1379

EUGENE F. DIAMOND, *et al.*,
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On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits

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BRIEF *AMICI CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AND THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS IN SUPPORT OF APPELLEES

INTEREST OF *AMICI CURIAE*

Amici curiae are six major organizations of health care professionals. Each *amicus* shares in common an abiding dedication to promote the public welfare through

the maintenance of the highest professional standards and the provision of quality health care. *Amicus* American Medical Association ("AMA") is a private, voluntary, nonprofit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 234,700 physicians and medical students.

Amicus American Academy of Family Physicians ("AAFP") is a national professional association whose membership includes approximately 56,000 family physicians and medical students. AAFP's purposes include promotion of excellence in health care and in the delivery and care of newborn infants. *Amicus* American Academy of Pediatrics ("AAP") is a nonprofit Pan-American Association of approximately 24,000 physicians certified in the specialized care of infants, children and adolescents. The AAP's principal purpose is to ensure the attainment by all children of their full potential for physical, emotional and social health.

Amicus Association of American Medical Colleges ("AAMC") is a national professional organization whose membership includes approximately 127 medical schools, 400 teaching hospitals and 76 academic societies in the United States. AAMC's purposes include the advancement of medical education and the improvement of health care in the United States. *Amicus* American Psychiatric Association (APA) is the nation's largest professional association specializing in psychiatry, with a membership exceeding 30,000 physicians. APA's purposes include promoting the welfare of patients who require psychiatric services.

Amicus American College of Obstetricians and Gynecologists ("ACOG") is a private, voluntary, nonprofit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading group of professionals providing health care to women; its 25,000 members represent approximately ninety percent of all ob-

stetricians and gynecologists practicing in the United States.[1]

Amici's interest in these cases stems from their desire to provide medical care of the highest quality, their dedication to good medical practice and their commitment to patients' freedom to seek and obtain needed medical care. To further these interests, physicians must be in a position to discharge their responsibility to provide care and treatment according to their best clinical judgment consistent with professional and ethical standards. *Amici*'s interest is not in debating the philosophical, ethical, moral or religious issues surrounding abortion. Indeed, their members hold widely divergent views on these issues, and *amici* take no position on these issues in this brief. *Amici*'s members do, however, share an interest in making certain that, when a patient does seek medical care and treatment, such as an abortion, state laws not impermissibly interfere with the physician's ability to exercise his or her best judgment in carrying out the patient's decision in the manner most suited to the patient's particular health needs.

The provisions of the Pennsylvania and Illinois statutes at issue in these appeals interfere with the exercise of a woman's right to seek and obtain wanted medical care, prevent her physician from exercising his best medical judgment in providing high quality medical care and create serious obstacles to sound medical practice. The outcome of these cases will directly affect the professional services *amici*'s members provide and the patients whom they serve. Accordingly, *amici* wish to present their views concerning the important issues raised in these appeals.[2]

---

[1] ACOG is an appellee in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, No. 84-495, and is filing a separate brief as a party in that appeal. Thus, it is joining this brief only with respect to the appeal in *Diamond* v. *Charles*, No. 84-1379.

[2] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

I.

This Court has long recognized that the individual has a fundamental right, derived in important part from the concept of "liberty" in the Due Process Clause, to make highly personal choices affecting marriage and procreation. More recently, it has held that this right embraces a women's decision whether and how to terminate her pregnancy. Because abortion is a medical procedure, a necessary corollary to the woman's constitutional right to make a decision about terminating her pregnancy is the right to establish and maintain a doctor-patient relationship with a physician. *Roe* v. *Wade*, 410 U.S. 113 (1973); *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). Despite the argument of the United States to the contrary, the principle of *stare decisis* requires reaffirmation of this fundamental privacy right, especially in light of *City of Akron*, in which the Court barely two years ago specifically underscored the importance and validity of the right.

In the nearly two dozen related cases handed down since *Roe* v. *Wade*, this Court has given content to the fundamental right by establishing a doctrinal framework which balances the woman's fundamental interest in making a personal medical treatment decision with the state's compelling interest in promoting maternal and fetal health. That framework was clearly articulated by the Court in *City of Akron*. First, the Court has established standards for determining when the fundamental privacy right has been infringed, thus requiring a state to satisfy the compelling interest standard of judicial review. Such infringement occurs when a state law interferes with a woman's decision whether or not to terminate her pregnancy or when a state law interferes with a physician's willingness or ability to enter into a physician-patient relationship with a woman considering an abortion, to

counsel the patient and to provide medically indicated care and treatment. Second, the Court has established a three-part compelling state interest test for laws that do infringe the woman's privacy right: the purpose of the state law must be to advance the state's compelling interests in maternal or fetal health; the specific means chosen must be "reasonably related" to those compelling health goals and thus consistent with sound medical practice; and those specific requirements must be tailored to the state's legitimate goals. In sum, the Court's decisions employ traditional constitutional standards applied in other contexts necessarily modified in this context to balance the privacy right to make a highly personal medical treatment decision against the state's compelling interests in maternal and fetal health.

II.

A. Pennsylvania's informed consent provision is unconstitutional. Although this Court has upheld a basic requirement that the physician must obtain the patient's informed consent, *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 67 n.8 (1976), it has held that state attempts to confine the physician's professional discretion as to how best to inform the patient concerning a medical procedure and its consequences infringe the privacy right. *Id.*; *City of Akron*, 462 U.S. at 445. Pennsylvania's compelled disclosures interfere with the physician's judgment and therefore trigger judicial scrutiny under the compelling interest test. The State's mandated disclosures to all patients seeking an abortion are inconsistent with accepted medical standards of individualized physician-patient communication and therefore are unconstitutional.

B. Illinois' "abortifacient" disclosure requirement is unconstitutional. The woman's right in consultation with her physician to employ methods of birth control is clearly part of the right of privacy recognized in *Gris-*

wold v. *Connecticut*, 381 U.S. 479 (1965), *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), and *Roe* v. *Wade*, *supra*. The State of Illinois compels the physician to communicate that a birth control method which interferes with the development of a fertilized egg constitutes "fetal death." This requirement is calculated to, and in fact will, interfere with the patient's decision and with the physician's ability to provide medically relevant information to the patient. Compare *City of Akron*, 462 U.S. at 445. The State has no compelling interest in discouraging women from using birth control methods. Moreover, "fetal death" is not a medically accepted description of the effect of most, if any, birth control techniques. Finally, not every woman needs or wants to have this information supplied to her. *Id.*

C. The Illinois and Pennsylvania fetal treatment provisions are unconstitutional. All three provisions attempt to regulate late abortions which virtually always involve women facing serious health problems. Available abortion methods involve risks, both to the mother and to the fetus. Section 6(4) of the Illinois Abortion Law of 1975 requires the physician to choose the abortion technique that will best protect the fetus without increasing the mother's health risk whenever there is a "possibility" of fetal survival. This provision is unconstitutional under *Colautti* v. *Franklin*, 439 U.S. 379 (1979), and because the requirement is inconsistent with medical practice.

Section 3210(b) of Pennsylvania's 1982 Abortion Control Act requires the physician after the fetus is viable to choose the abortion method most likely to protect the fetus unless that method "significantly" increases the mother's health risk, which is defined expressly *not* to include emotional or psychological health. By preferring the fetus's health over the mother's, and by forcing the physician to disregard certain facets of the mother's con-

dition, Pennsylvania attempts to further its compelling interest in fetal health in ways that this Court already has held are absolutely inconsistent with accepted medical practices. *See, e.g., Colautti* v. *Franklin*, 439 U.S. at 400; *Planned Parenthood* v. *Ashcroft*, 462 U.S. 476, 485 n.8 (1983) (Powell, J.).

Section 6(1) of the Illinois statute requires the physician to choose the abortion method that best protects the fetus's chance of survival, if the fetus is "known to be viable." Although the statute burdens the patient-physician privacy right by regulating the physician's treatment decision at a time of maximum danger to the pregnant woman, the State does seek to further its compelling interest in fetal health. But the State cannot justify this imposition of a general requirement on the physician's exercise of medical judgment in an individual case when he is planning and performing a late pregnancy abortion because such a requirement impermissibly increases the risk to the mother's health.

D. Pennsylvania's "second-physician" requirement for abortions of a viable fetus can only withstand constitutional scrutiny under this Court's decision in *Planned Parenthood* v. *Ashcroft*, if it contains a clear exception for emergency operations. The affirmative defense for medical necessities in Pennsylvania's law is not sufficiently clear to comply with the holding in *Ashcroft*.

E. Pennsylvania's reporting requirement is unconstitutional. Pennsylvania requires physicians to supply it with 14 items of information about each abortion and compels physicians to explain the bases for their medical judgments regarding certain treatment decisions. Some of those requirements are unnecessarily burdensome. *See Planned Parenthood* v. *Danforth*, 428 U.S. at 80-81. Moreover, the State has made no effort to explain concretely how this information is carefully tailored to its interest in promoting maternal health.

ARGUMENT

I. THIS COURT HAS ESTABLISHED A DOCTRINAL FRAMEWORK FOR IMPLEMENTING A WOMAN'S PRIVACY RIGHT TO MAKE A PERSONAL MEDICAL TREATMENT DECISION ABOUT TERMINATION OF A PREGNANCY IN CONSULTATION WITH A PHYSICIAN.

In its brief *amicus curiae*, the United States takes the highly unusual position of asking this Court to overrule a recent decision of the Court interpreting the Constitution—*Roe* v. *Wade*, 410 U.S. 113 (1973). The federal government argues that *Roe* v. *Wade* should be abandoned because the privacy right announced in that case cannot properly be derived from the Constitution and because legal standards for implementing the right do not exist. (U.S. Br. at 20-30.) But a general right of privacy has a long history in the jurisprudence of this nation and this Court, and the specific rights at issue here follow logically from precedents of this Court which the United States itself considers valid. Moreover, as emphasized in this Court's decision in *City of Akron*, this Court has developed a doctrinal framework for implementing a woman's right to make a personal medical treatment decision, in consultation with her physician, relating to procreation. This framework balances the individual's fundamental privacy right with the states' strong interests in maternal and fetal health.[3] Before addressing the specific provi-

[3] *Amici* recognize that reasonable people differ about how to balance the privacy right against the state's interest in maternal and fetal health, and in particular about whether the state has a compelling interest in fetal health before viability. This brief is premised on the fact that this balance has already been struck by the prior decisions of the Court. Given the diversity of views of their members, *amici* neither endorse nor oppose the Court's holding that the state's compelling interest begins at viability. As noted above, *amici's* interest is in ensuring that, when a woman seeks medical treatment, state laws do not impermissibly infringe on the ability of her physician to provide such treatment in the manner best suited to the patient's needs.

sions of state law at issue in these cases, *amici* will briefly discuss these important threshold matters.

A. The Fundamental Privacy Right Arises In The Context Of A Medical Treatment Decision.

1. This Court has long recognized that, as part of the "liberty" protected by the Constitution's Due Process Clauses, the Constitution guarantees to each individual certain areas or zones of privacy which remain free from unjustified government interference or intrusion, although the Constitution itself does not include an express right of privacy. Compare *Union Pacific Ry.* v. *Botsford*, 141 U.S. 250, 251 (1891), with *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969). The Court's privacy rulings rest on the theory that the constitutional text does not, on its face, specify all rights that warrant constitutional protection from executive or legislative intervention.[4]

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[4] The concept of "liberty" in the Due Process Clause of the Fourteenth Amendment is a "broad" one. *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972). For this reason, it has long been recognized as protecting certain personal choices. *See, e.g., Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390, 399-400 (1923). Judicial recognition of an individual's relatively limited right, as part of personal liberty, to be free from unnecessary governmental intrusion because of the private nature of a personal decision hardly can be compared in scope, as the United States attempts to do (U.S. Br. at 29-30), to the judicial activism that marked the era of *Lochner* v. *New York*, 198 U.S. 45 (1905), and its progeny. *See Roe* v. *Wade*, 410 U.S. at 167-171 (Stewart, J., concurring).

Moreover, privacy is hardly the only value that has received constitutional recognition without being expressly specified in the constitutional text. For example, this Court has had little difficulty in deriving a constitutional right to travel. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). In addition, although "federalism" is nowhere mentioned in the Constitution, it is commonly assumed that the doctrine is part of the constitutional scheme and that judicial intervention is warranted if the federal legislative or executive branches intrude into state prerogatives. This Court has recognized as much. *See Coyle* v. *Smith*, 221 U.S. 559, 565 (1911); *Garcia* v. *San Antonio Metropolitan Transit Authority*, —— U.S. ——, 105 S. Ct. 1005, 1020 (1985).

The essence of the right to privacy is the concept that an individual in certain circumstances has a right to be let alone, *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), and that the individual must thus have "independence in making certain kinds of important decisions." *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977). At the core of such a right are matters concerning marriage and procreation; the spectre of governmental agents unnecessarily interfering with such inherently private, individual decisions is antithetical to basic concepts of individual liberty in a free society. *See Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). *See also Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).[5]

2. Building on the precedent of constitutional protection for individual decisions affecting marriage and procreation, this Court in *Roe* v. *Wade* held that the "right of privacy . . . found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state

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[5] The United States seems to accept *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), as a legitimate decision on the ground that enforcement of a statute prohibiting the use of contraceptives would require wholly impermissible governmental prying into the private lives of individuals. (U.S. Br. at 20 n.6). Having accepted *Griswold*, however, the government's textual theory (U.S. Br. at 23-28) for rejecting *Roe* v. *Wade* collapses, because this Court did not locate the right recognized in *Griswold* in a specific constitutional provision and could not, as the United States suggests, have located it in the Fourth Amendment alone (because the Amendment guarantees procedural, not substantive, rights). The United States' brief therefore bears "witness that the *right of privacy* which passes for recognition here is a legitimate one." *Griswold*, 381 U.S. at 485 (emphasis added). Once the existence of a constitutional privacy right is, in effect, conceded, the United States' theory reduces to whether unnecessary governmental intrusion into a hospital operating room or a physician's examining room during a medically indicated obstetric or gynecologic procedure or examination is somehow inherently less repugnant than a similar governmental attempt to search a home.

action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. As this Court emphasized in *City of Akron*, 462 U.S. at 420 n.1, since *Roe* was decided in January 1973, the Court has affirmed the basic principle that a woman has a "fundamental right" to make the highly personal choice whether or not to terminate her pregnancy. *See, e.g., Connecticut* v. *Menillo*, 423 U.S. 9 (1975); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Harris* v. *McRae*, 448 U.S. 297 (1980); *H.L.* v. *Matheson*, 450 U.S. 398 (1981). Because this Court in *City of Akron* recently applied the *Roe* holding based, in part, on principles of *stare decisis*, there are now "especially compelling reasons" for reaffirming the woman's privacy right to make highly personal medical treatment decisions relating to procreation without unjustified governmental interference. *City of Akron*, 462 U.S. at 420 n.1.[6]

3. Because abortion is "inherently" and "primarily" a medical procedure, *Roe* v. *Wade*, 410 U.S. at 166, a corollary to the constitutional right to make a decision about termination of her pregnancy is the woman's right to establish and maintain a doctor-patient relationship with the physician of her choice. As this Court stated in *City of Akron*, 462 U.S. at 427 (citations omitted; emphasis added):

> [T]he full vindication of the woman's fundamental right necessarily requires that her physician be given

[6] Given the Court's recent adherence to *Roe* v. *Wade*, in express reliance upon principles of *stare decisis*, the United States' request for overruling that case now is particularly curious. It is, in effect, asking this Court not only to reconsider a constitutional precedent 13 years old, but also *City of Akron*, which was handed down barely *two* years ago. Indeed, certain passages of the brief read as if it were an untimely petition for rehearing of *City of Akron*. (U.S. Br. at 16-20.)

> "the room he needs to make his best medical judgment." . . . *The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion.*

The Court has, accordingly, given "consistent recognition" to the "critical role of the physician in the abortion procedure." 462 U.S. at 448 n.39.[7] Indeed, a dominant and recurring theme in this Court's abortion cases is that to effect the woman's constitutional right the physician must have freedom: (a) to enter into a physician-patient relationship; (b) to advise the patient properly; and (c) to perform appropriate medical procedures for her, consistent with accepted medical standards. *City of Akron*, 462 U.S. at 427; *Colautti* v. *Franklin*, 439 U.S. at 387.[8]

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[7] That the woman's right to decide whether to terminate a pregnancy encompasses the right to a physician-patient relationship—indeed takes root in a medical context—is reflected in *Connecticut* v. *Menillo*, 423 U.S. 9, 11 (1975). There the Court held summarily that "prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference."

This congruence between the physician's interest in exercising professional judgment on behalf of the patient and the woman's decision whether or how to terminate her pregnancy received concrete recognition in *Singleton* v. *Wulff*, 428 U.S. 106, 117 (1976), where a plurality of the Court held that physicians could assert the constitutional rights of their patients. Noting that the physician is "intimately involved" in the abortion decision and that the "woman cannot safely secure an abortion without the aid of a physician," the plurality concluded that "[a]side from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision." *Id.* at 117. *See also Whalen* v. *Roe*, 429 U.S. at 604 n.33.

[8] Thus, in *Roe* itself, the Court described the essential right in terms of the physician's ability to practice medicine on behalf of the woman—the physician, in consultation with the patient, must be "free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy must be terminated" and once the decision to abort is made, the abortion must be performed "free of interference by the State." 410 U.S. at 163. On the same

In *Planned Parenthood* v. *Danforth*, *supra*, the Court analyzed the important role of the physician in consulting with the patient prior to any medical procedure. In upholding a State-imposed requirement that the consultation process must produce at its conclusion a signed, written consent form, the Court expressly recognized that too great an intrusion into the consultation process itself "might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." 428 U.S. at 67 n.8. The Court in *City of Akron* applied the *Danforth* dictum to protect the physician and patient from efforts by the government to intrude into the pre-decision consultation process. In striking down a law requiring the physician to recite a litany of abortion "facts," the Court reasoned: "It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." 462 U.S. at 443.

Similarly, once the woman in consultation with her attending physician has decided to undergo an abortion, her privacy right requires that substantial deference be accorded to the judgment of her physician in carrying out that decision. Thus, for instance, the fundamental decision whether a fetus is viable must be "a matter for the judgment of the responsible attending physician." *Planned Parenthood* v. *Danforth*, 428 U.S. at 64; *Colautti* v. *Franklin*, 439 U.S. at 396. And, the procedure of choice recommended by the physician is generally not subject to restriction by the state. 428 U.S. at 78. Ordinarily, the

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day *Roe* was decided, the Court in *Doe* v. *Bolton*, 410 U.S. 179 (1973), struck down a Georgia state law requiring the approval of a hospital staff abortion committee before a physician could perform an abortion. The Court held that the procedure interfered with the physician's exercise of his best judgment and the physician's "right to administer" medical care. 410 U.S. at 197. *See also id.* at 208 (Burger, C. J., concurring); *Bellotti* v. *Baird*, 443 U.S. 622, 641 (1979).

state's health interests are fully protected by the duty of care the physician owes the patient and the ethical duties demanded by the medical profession. *Doe* v. *Bolton*, 410 U.S. at 199. *See also id.* at 207-208 (Burger, C.J., concurring).[9]

B. State Interference With the Woman's Choice Between Abortion And Childbirth Or With the Woman's Relationship With Her Physician Triggers Searching Judicial Examination Pursuant To The Compelling State Interest Test.

1. Having established that the right to decide whether to terminate a pregnancy, and the correlative right to a physician-patient relationship, is "fundamental" in a constitutional sense, this Court has further held that state "interference" or "infringement" of that right triggers a searching judicial examination pursuant to the compelling state interest test. *Roe* v. *Wade*, 410 U.S. at 155; *City of Akron*, 462 U.S. at 427. The requirement that a state justify "interference" or "infringement" of a fundamental constitutional right under a compelling state interest test is, of course, well-established in constitutional adjudication.[10]

Given the nature of the right, there are two types of infringement which trigger heightened judicial scrutiny. First, infringement occurs when state laws interfere with the *woman's* decisions whether to enter into a physician-

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[9] In addition to the woman's right of privacy, physicians, of course, also have an independent right under the Due Process Clause of the Fourteenth Amendment to reasonable notice concerning precisely which of their actions violate the criminal laws of the state. Medicine is not an exact science, and therefore the state must carefully define the scope of criminal liability that it attempts to apply to various aspects of the practice of medicine. *Colautti* v. *Franklin*, 439 U.S. at 392-394. Moreover, criminal liability which is not properly defined may deter physicians from engaging in arguably protected activity to the detriment of the patient. *Id.* at 394.

[10] *See, e.g., Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

patient relationship with respect to abortion and whether or not to terminate her pregnancy. This Court has established certain standards for determining whether such an infringement has occurred: when a state abortion law imposes additional health risks on the woman; when a state law attempts to influence the woman's informed choice between abortion or childbirth through the physician-patient relationship; when a state attempts to force the woman to share decision-making authority with a spouse; or when a state law imposes costs on a woman unique to the abortion procedure.[11]

Second, infringement occurs when state laws interfere with a *physician's* willingness or ability to enter into a doctor-patient relationship, to counsel his patient and to provide medically indicated care and treatment.[12] Thus, there is infringement when a state law interferes with a physician's best medical judgment or is otherwise inconsistent with the state of medical knowledge and sound medical practice; when a state law threatens the doctor with sanctions which arise solely from abortion counseling and treatment; or when a state law imposes other burdens on a physician in the abortion context which could deter establishment of a physician-patient relationship or the

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[11] See, *e.g.*, additional health risks—*Harris* v. *McRae*, 448 U.S. 297, 328 (1980) (White, J., concurring); influence woman's choice—*City of Akron*, 462 U.S. at 444; share decision-making authority—*Planned Parenthood* v. *Danforth*, 428 U.S. at 69; and costs unique to abortion—*City of Akron*, 462 U.S. at 435, 438, 447.

[12] Examples of how state intrusions operate illustrate pointedly why the privacy right extends both to the woman's decision *and* to the relationship between the patient and physician. Thus, regulations that affect the physician's practice of medicine will very often affect the woman's decision or ability to have an abortion. For instance, if the state declares unlawful the only abortion procedure that would be safe for a particular woman, then the state interferes with the physician's ability to practice medicine according to his best medical judgment and the woman will be effectively denied her right to make a decision whether to have an abortion.

discharge of professional obligations within that relationship.[13]

2. This Court has also held that certain types of governmental actions relating to abortion do not infringe the fundamental privacy right and thus do not trigger the compelling state interest test. First, there are laws which do not subsidize the abortion procedure at levels equal to a state subsidy granted to other medical procedures. The Court has held that refusal to finance an abortion with state or federal money,[14] or to make publicly-financed hospitals available for abortions, does not impose any additional burden either on the woman or her physician. In these circumstances, the woman "suffers no disadvantage" of constitutional significance by the government's refusal to extend benefits to her to which she otherwise can make no claim of Constitutional entitlement. *Maher* v. *Roe*, 432 U.S. 464, 474 (1977); *Harris* v. *McRae*, 448 U.S. 297, 314 (1980). Such a decision not to fund is valid so long as it is rationally-related to a legitimate purpose.[15]

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[13] See, *e.g.*, interference with best medical judgment—*Doe* v. *Bolton*, 410 U.S. at 195-200, *Planned Parenthood* v. *Danforth*, 428 U.S. at 64, *City of Akron*, 462 U.S. at 445, 450; inconsistent with state of medical practice—*Planned Parenthood* v. *Danforth*, 428 U.S. at 63-64, *City of Akron*, 462 U.S. at 448; sanctions solely from abortion role—*Colautti* v. *Franklin*, 439 U.S. at 390, 394, 397; other burdens—*Planned Parenthood* v. *Danforth*, 428 U.S. at 79-80 (record keeping requirement needs justification).

[14] *Harris* v. *McRae*, 448 U.S. 297, 314 (1980); *Williams* v. *Zbaraz*, 448 U.S. 358, 369 (1980); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Maher* v. *Roe*, 432 U.S. 464 (1977).

[15] The United States misinterprets this Court's holdings in the abortion funding cases by relying upon them to support more expansive efforts by the state to regulate the abortion process directly. (U.S. Br. at 3.) The state's interest in favoring birth over abortion is only legitimate when the state's action does not interfere with the privacy right; otherwise, the two interests are mutually exclusive. *See Roe* v. *Wade*, 410 U.S. at 163-164. The state may favor childbirth over abortion in the context of dispensing benefits to which the woman has no constitutional entitlement, without inter-

Second, there are "minor regulations" which "may not *interfere* with physician-patient consultation or with the woman's choice between abortion and childbirth." *City of Akron*, 462 U.S. at 430 (emphasis added). Thus, by definition, a regulation is "minor" as a general matter when it does not "interfere" with or infringe the fundamental right under this Court's standards for determining such infringements. *See* pp. 14-16, *supra*. For example, a state law is "minor" in this constitutional context when it applies equally to abortions and to other medical procedures.[16] Even these "minor" state laws relating to, but not interfering with, the fundamental right must further "important health related state concerns" to be valid. 462 U.S. at 430.

C. The Compelling State Interest Test In The Abortion Context Has Three Distinct Elements All Of Which Must Be Satisfied If An Infringing Law Is To Be Valid.

If a state law infringes a fundamental right, then that law is "presumptively unconstitutional", *Harris* v. *McRae*, 448 U.S. at 312, *quoting Mobile* v. *Bolden*, 446 U.S. 55, 76 (1980), and cannot withstand judicial scrutiny unless the compelling state interest test is met. In the abortion context the compelling state interest test is comprised of three elements: the purpose of the state's law must be to advance the state's "compelling interests" in maternal or fetal health; the specific means chosen must be "reasonably related" to those compelling goals and thus consistent with sound medical practice; and those specific requirements must be carefully tailored to the state's legitimate goals. Under this Court's decisions,

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fering with the fundamental right. But, when it touches the highly personal issue of whether to terminate a pregnancy, such a preference by the state constitutes an infringement of the right. *See City of Akron*, 462 U.S. at 444 n.33.

[16] *See Planned Parenthood* v. *Danforth*, 428 U.S. at 66-67; *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 486-490 (Powell, J.); *City of Akron*, 462 U.S. at 420.

failure to satisfy *any* of these elements is fatal to the state's effort to infringe the woman's fundamental right. *City of Akron*, 462 U.S. at 426-431.

In much fundamental rights adjudication, a holding of infringement will doom a law because the state has no constitutionally recognized "compelling interest" in such an infringing enactment. In the abortion context, however, this Court has clearly recogized two "compelling" goals which can justify regulation of the decision whether or not to terminate a pregnancy. Thus, the state may have a compelling interest in protecting the mother's health after the first trimester of a pregnancy.[17] *Roe* v. *Wade*, 410 U.S. at 154, 163; *City of Akron*, 462 U.S. at 428-429. Similarly, at the point of viability, the state has a compelling interest in preserving the potential life of the fetus, so long as the fetus's survival does not pose a threat to the life or health of the mother. *Roe* v. *Wade*, 410 U.S. at 162-163; *City of Akron*, 462 U.S. at 428. *See* note 3, *supra*.

Second, the presence of a compelling purpose does not ensure the constitutionality of the state's particular infringement of the fundamental privacy right. As the Court explained in *City of Akron*, 462 U.S. at 434, "the existence of a compelling state interest in health, how-

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[17] The state's interest in maternal health was held to be compelling at the end of the first trimester in *Roe* v. *Wade* because "mortality in abortion may be less than mortality in normal childbirth." 410 U.S. at 163. In *City of Akron*, this Court retained the beginning of the second trimester "as the approximate time at which the State's interest in maternal health becomes sufficiently compelling to justify significant regulation of abortion." 462 U.S. at 429 n.11. But, as noted immediately below, although the state's compelling interest in promoting maternal health begins at the end of the first trimester, a second trimester regulation to achieve that end will only survive judicial scrutiny if it satisfies the second element of the compelling state interest test and is consistent with accepted medical practice. *Id.* (Second trimester regulations must have "reasonable medical basis.")

ever, is only the beginning of the inquiry." Thus, a state's requirements must be "reasonably relate[d]" to the compelling goals. *Roe* v. *Wade*, 410 U.S. at 163; *City of Akron*, 462 U.S. at 434. Typically, this second, "reasonably related" element of the test involves an inquiry into whether the state's requirements are consistent with accepted medical practices. Thus, when the state purports to regulate to further the health of the mother or fetus, it is obliged to adopt measures that have a reasonable medical basis. "The State's discretion to regulate . . . does not, however, permit it to adopt abortion regulations that depart from accepted medical practice." *City of Akron*, 462 U.S. at 431. *See Planned Parenthood* v. *Ashcroft*, 462 U.S. at 487 (Powell, J.); *Planned Parenthood* v. *Danforth*, 428 U.S. at 78.[18] This rule embodies the common sense proposition that, if a state is to further a health related goal, *i.e.* maternal health, it must use accepted medical means in doing so. *See City of Akron*, 462 U.S. at 431.

Third, state laws that interfere with or burden the right must be carefully tailored to the state's objective. *See Roe* v. *Wade*, 410 U.S. at 165; *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 n.8; *City of Akron*, 462 U.S. at 438. The law must, in other words, not be overbroad and must, therefore, advance the compelling state interest without any additional and unnecessary interference with the fundamental right. *City of Akron*, 462

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[18] For instance, in *City of Akron* the Court held that the City's requirement that all second-trimester abortions be performed in a hospital was unconstitutional, because the practices of the medical profession had advanced to the point that such abortions could be performed safely and were being performed routinely in out-patient clinics. The City was therefore obliged to follow the accepted medical practice when it attempted to regulate directly the physician's medical practices in a way that in turn affected the patient's decision whether to seek treatment. 462 U.S. at 437.

U.S. at 438.[19] Thus, for example, the state has a compelling interest in the health of the woman after the first trimester, but in promoting that interest, the state cannot require the abortion to occur only in a hospital, regardless of the patient's condition. *City of Akron*, 462 U.S. at 437. It can, of course, regulate out-patient clinics to ensure that they are capable of responding to complications that might commonly occur. In this way the state protects its interest without undermining the physician's judgment about how best to treat the particular patient.[20]

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This framework established by the Court's abortion decisions is not the product of a series of *ad hoc* judicial responses to specific attempts by some states, often the same ones repeatedly, to regulate various facets of the abortion process. Rather, consistent with sound traditions of constitutional adjudication, the Court has proceeded on a case-by-case basis to define the contours of the right. Its decisions employ the traditional constitutional standards applied in other contexts with necessary modifications made to adjust both to the unique medical context implicated by the personal decision to terminate a pregnancy using *medical* procedures and to the state's compelling interest in maternal and fetal *health*. Although those standards may require the Court to engage in some difficult line drawing within the interstices of the framework, those interstitial judgments are no more

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[19] This is also traditionally required when other fundamental rights are infringed by governmental action. *See, e.g., Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

[20] Although the Court in *City of Akron* relied heavily upon the effect of the hospitalization requirement on the woman's ability to afford an abortion, in our view it could also have relied upon the intrusion into the physician's judgment as to the best setting in which to perform the medical procedure.

difficult than the problems posed in applying other constitutional provisions in a modern era. Compare *Katz* v. *United States*, 389 U.S. 347, 352 (1968) (importance of accommodating constitutional guarantees to changing technology). That certain concepts in the Court's framework—for example, maternal health or fetal viability—are defined with reference to contemporary standards of social or medical science is hardly unusual or problematic.[21] Thus, if fetal viability occurs earlier in a pregnancy because of medical advances, then the state's compelling interest in protecting fetal health will simply be triggered sooner. *Cf.*, *City of Akron*, 462 U.S. at 456-457 (O'Connor, J., dissenting).

In sum, this Court's decisions demonstrate that, in the years since *Roe* v. *Wade*, the Court has developed a set of legal standards to guide state and local governments and lower federal courts in deciding where the boundaries of the privacy right lie. That state legislatures may continue to explore the limits of those boundaries is no rea-

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[21] In *Addington* v. *Texas*, 441 U.S. 418, 430 (1979), for example, the Court unanimously established the due process standards for involuntary civil commitments based on the state of medical practice at the time. The Court expressly relied upon "practical considerations" arising from the nature of psychiatry in shaping its burden of proof standard. 441 U.S. at 434. Simply because the Court similarly applies standards in the abortion context to take account of "practical" medical considerations does not, *per se*, cast any doubt upon the Court's approach.

In addition, this Court routinely has relied upon social science materials and concepts in resolving complicated constitutional issues in a wide range of cases. *See, e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483, 494 n.11 (1954). Thus, for instance, political science analyses have been utilized in applying the one-person-one-vote principle of the Fourteenth Amendment, *see, e.g.*, *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 645 n.9 (1964), and economic analysis has been instrumental in deciding commerce clause cases, *see, e.g.*, *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, 378 n.11 (1964).

son to abandon them. Instead, the Court should reaffirm its commitment to the woman's right in consultation with her physician to make fundamental, personal decisions about medical treatment relating to procreation without unjustified governmental interference.

II. THE STATE LAWS AT ISSUE IN THESE APPEALS ARE UNCONSTITUTIONAL.[22]

Application of the Court's doctrinal framework renders the state laws at issue in these cases unconstitutional. Indeed, certain provisions are invalid as directly in conflict with prior holdings of the Court.

A. Pennsylvania's Informed Consent Provisions Are Unconstitutional.

Section 3205 of Pennsylvania's 1982 Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3205 (Purdon 1983), lists certain information that the physician must recite to each woman as part of the process of obtaining her informed consent to the aborton procedure. This informa-

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[22] Appellants in both cases raise a number of procedural issues including jurisdiction and mootness. *Amici*, with one exception discussed immediately below, do not address these issues but proceed as if all of the substantive issues are before the Court.

Pennsylvania has presented an issue concerning its parental consent statute for minors seeking abortions. 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983). The court of appeals enjoined enforcement of the provision until the State Supreme Court adopted rules to implement the provision for judicial review of the minor's ability to give consent to the procedure. Pennsylvania's argument in this Court now turns largely on rules recently adopted by its Supreme Court which obviously were not considered by the lower courts. (Pa. Br. at 76-77.) Because the court of appeals' disposition of this issue was clearly correct at the time of the decision, *amici* submit that that decision should be affirmed. *Amici* believe the Court should dispose of this issue without considering the new rules *de novo*; we thus take no position on the constitutionality of those rules.

tion includes, *inter alia:* the fact that the woman may suffer unforeseeable and detrimental physical and psychological consequences from the abortion, the medical risks associated with full-term pregnancy, and the "probable gestational age of the unborn child." The physician or his agent also must inform the mother that, if she carries the child to term, the mother may qualify for state or private financial assistance and would be entitled to child support from the father. § 3205(b).

In addition, the woman must be offered printed materials prepared by the State. 18 Pa. Cons. Stat. Ann. § 3208 (Purdon 1983). The printed materials will describe the developing physical characteristics of the fetus in two-week gestational increments. These materials also must contain a statement that the State "strongly urges" the woman to contact listed agencies offering alternatives to abortion before she consents to the procedure.

1. *Medical Background.* In order to understand how Pennsylvania's informed consent provision interferes with the physician-patient consultation process, it is necessary first to understand how that process works. Consultation is the method of ensuring that each patient gives a knowing and voluntary informed consent to a medical procedure. The doctrine of informed consent is itself rooted in notions of patient autonomy and the uniqueness of each patient's needs. *See, e.g., Canterbury* v. *Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); E. Cassell, Talking With Patients 4-5 (1985); Waltz & Scheuneman, *Informed Consent to Therapy*, 64 Nw. U. L. Rev. 628, 630 (1970). Just as some patients wish to be informed about every conceivable complication, no matter how remote, that may result from a medical procedure, others find such information frightening and would prefer to be spared the details. *See, e.g.*, Laufman, *Surgical Judgment*, in Christopher's Textbook of Surgery 1459 (L. Davis 9th ed. 1968);

Nehemiah, *Psychological Aspects of Surgical Practice*, in Surgery: A Concise Guide to Clinical Practice 9 (G. Nardi & G. Zunidema 3d ed. 1972). As the Court pointed out in *City of Akron*, "it is clear that the needs of patients for information and an opportunity to discuss the abortion decision will vary considerably." 462 U.S. at 448 n.38. *See also Canterbury* v. *Spence*, 464 F.2d at 789; *Sard* v. *Hardy*, 281 Md. 432, 443, 379 A.2d 1014, 1022 (1977).[23]

The informed consent doctrine thus stresses that the degree and kind of information to be conveyed must differ with the patient and the procedure; no universal list of information can provide each patient with proper information. For that reason, the decision about what specific information should be disclosed to the patient must be left to the physician's discretion. *See* 1 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 18-39 (1982).

2. *Infringement.* This Court previously considered whether informed consent provisions infringe the wom-

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[23] For example, when excessive disclosure would result in anxiety, fear, emotional distress or even increased physical pain, physicians may decide in the exercise of their professional judgment to tell their patient no more than she wishes to hear. *See, e.g., Roberts* v. *Wood*, 206 F. Supp. 579, 583 (S.D. Ala. 1962) (disclosure of risks of "a technical nature beyond the patient's understanding" may cause "anxiety, apprehension, and fear . . . [with] a very detrimental effect on some patients"); *Woolley* v. *Henderson*, 418 A.2d 1123, 1130 (Me. 1980) (the doctor must decide "whether disclosure of possible risks may have such an adverse effect on the patient as to jeopardize success of the proposed therapy"; "full disclosure under some circumstances could constitute bad medical practice"); *Cobbs* v. *Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (*en banc*) (a patient has a right to decline to be informed about the risks of a proposed medical procedure). *See generally* J. Katz, Experimentation with Human Beings 540-588 (1972); Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decision-making*, 1979 Wis. L. Rev. 413, 429.

an's fundamental right in *Planned Parenthood* v. *Danforth* and *City of Akron*. The Court in *Planned Parenthood* held that the state's law requiring the physician to obtain a written informed consent form signed by the patient did not infringe the fundamental right. But the Court warned against specific structuring of the informed consent process by the state. 428 U.S. at 67 n.8. In *City of Akron*, the Court found the City's attempt to compel the physician to communicate specific information about abortions and their procedures an interference with the fundamental right.[24] In rejecting the City's attempt to structure the physician-patient dialogue, the Court repeated the warning it had issued in *Danforth* "against placing the physician in . . . an 'undesired and uncomfortable straightjacket.'" 462 U.S. at 445. Thus, this Court has plainly indicated that attempts by the state to dictate precisely what information must be included as part of the consultation process interfere with the privacy right.[25]

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[24] Both Pennsylvania (Pa. Br. at 71) and the United States (U.S. Br. at 8) rely heavily upon the Court's dictum in *City of Akron* that certain required information, such as the fact the woman is pregnant, that she may be eligible for state assistance and the gestational age of the fetus, "certainly is not objectionable." 462 U.S. at 445 n.37. But the Court did not state that it is *constitutional* for the state to interfere with the physician-patient relationship by compelling these or any disclosures. It merely found that these "facts" were not "objectionable," the way other Akron provisions were because these did not discourage a woman from having an abortion. The Court was not required to and did not say that it was going beyond *Danforth* which held only that the state can, without dictating the content of the form, properly require a written consent form signed by the patient.

[25] The State argues (Pa. Br. at 65) that because it did not *intend* to discourage abortions, its provision must be constitutional under *City of Akron*, in which the Court held, *inter alia*, that the City's intent to discourage abortions made its informed consent law unconstitutional. 462 U.S. at 445. The State reads too much into the discussion of intent in *City of Akron*. The Court did not adopt a subjective "intent" test as a necessary element of an infringement

In light of the individualized nature of the consultation process, Pennsylvania's required disclosures strike directly at the protected relationship between the woman and her physician by attempting to structure the dialogue between them. The State seeks to dictate that certain topics and information must be covered in consultation with every patient, regardless of the physician's best judgment. It also forces the physician to act, in effect, as the agent of the State; by emphasizing unforeseen risks of abortions and by recommending that the woman postpone her decision, the physicians are being forced indirectly to encourage all their patients to decide not to have an abortion.[26] Sections 3205 and 3208 are not "minor" obligations that would typically be applied to any other medical procedure. These provisions constitute infringement of the fundamental right because they are an attempt by the State to influence the woman's choice and directly burden the physician's exercise of medical discretion. *See, e.g., Roe* v. *Wade*, 410 U.S. at 165-166; *Singleton* v. *Wulff*, 428 U.S. at 128 (Powell, J.).[27]

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inquiry. It merely found that the City's intent was obvious and unconstitutional. Under the analysis outlined previously, the Court also must focus on the effect of the state's law which plainly interferes with the physician-patient relationship in the pre-decision, consultation process. In any event, by requiring more disclosures concerning the risks of abortion than the risks of childbirth and by requiring the physician to offer material that "strongly urges" the woman to consider postponing her decision, Pennsylvania manifestly intends, just as much as Akron did, to discourage the woman's exercise of her constitutional right.

[26] Instead of using its resources to inform women through a public forum about what state-supported options are available, if the woman chooses to carry her pregnancy to term, or to express generally the State's views concerning childbirth, the State enlists the physician as its agent. Thus, the State improperly manipulates the patient-physician relationship so as to influence the patient's basic decision. *See* note 28, *infra*.

[27] The United States appears to argue (U.S. Br. at 8) that the information requirement is permissible because physicians are free

2. *Compelling Interest Analysis.* To withstand constitutional scrutiny, the State must demonstrate that communication to the patient of State-mandated information is consistent with accepted medical practices and is narrowly tailored to further Pennsylvania's only asserted goal—promotion of maternal health. This it cannot do. In the first place, the State's interest in the mother's health, which could justify the intrusion into the physician-patient relationship, is not compelling until at least after the first trimester. Thus, the required disclosures do not advance any compelling interest prior to that time.

In addition, it is clear that Pennsylvania's informed consent requirement is not reasonably related to maternal health because it is inconsistent with accepted medical practices. As explained previously, good medical practice demands that patient and physician decide together on treatment based on the specific needs of *each* patient. "[E]thically valid consent is a process of shared decisionmaking based upon mutual respect and participation, not a ritual to be equated with reciting . . . the risks of particular treatments." 1 *Making Health Care Decisions* 2; E. Cassell, Talking with Patients 4-5 (1985).[28] *See City of Akron*, 462 U.S. at 448 n.38.

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to supply the patient with any additional, truthful information they wish. But this is no answer to the argument that the State's requirements interfere with the fundamental right. The State has already artificially modified the patient-physician relationship by forcing discussions into directions that, in the physician's judgment, may not be helpful to a particular patient and may affect the trust and confidence of the patient in her physician. Nor does the physician's right to respond justify the infringement. A mere opportunity to undo the damage cannot constitute a compelling interest required to justify the regulation. Moreover, the federal government's argument was at least implicitly rejected by this Court in *City of Akron*: the physicians in that case were equally free to attempt to rebut the "litany" of "facts" required by the City.

[28] Indeed, the recent Presidential Commission indicted such recitations of medical risks as damaging both to the patient and the patient-physician relationship:

Pennsylvania mandates a hollow ritual; among other things, it forces physicians to discuss as a "fact" unforeseeable "detrimental physical and psychological" risks of abortion that they may regard as wholly irrelevant to the patient. Compare *City of Akron*, 462 U.S. at 445.[29] Moreover, this type of disclosure may cause the woman unneeded and unwarranted anxiety about the procedure and thereby serve only to complicate her condition. By discouraging the woman from having an abortion, the required disclosures may also increase her health risks. For these reasons as well, the required disclosure is not reasonably related to the State's goal of promoting maternal health.

It follows, of course, that the Pennsylvania statute also cannot satisfy the "carefully tailored" requirement of the compelling interest test because the State requires all women to receive certain information, regardless of whether it will be medically beneficial to them. In addi-

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> . . . Patients' interests are not well served by detailed, technical expositions of facts . . . reciting 'all the facts' in a blunt, insensitive fashion can . . . destroy the communication process, as well as the patient-professional relationship itself. 1 *Making Health Care Decisions* 71.

[29] *City of Akron* undermines the State's heavy reliance upon *Planned Parenthood* v. *Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd mem.*, 428 U.S. 901 (1976), as requiring reversal on the informed consent issue. In the first place, the requirement in the earlier Pennsylvania Act, which still remains in the provision at issue here, that the *physician* must supply certain information to the patient makes the provision plainly unconstitutional under *City of Akron*. Moreover, *City of Akron* provides the appropriate analytical framework for this issue. Not one judge on the Third Circuit in this case, including Judge Adams who wrote the opinion for the court in *Fitzpatrick* on the informed consent issue, even mentioned *Fitzpatrick* as relevant. Instead, all of the judges who wrote below analyzed the issue solely in terms of this Court's plenary decision in *City of Akron*. Accordingly, the Court's summary affirmance, which is in any event entitled to considerably less precedential weight than an opinion on the merits, *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974), is entitled to no weight when it already has been superseded by this Court upon subsequent plenary review of the issue.

tion, the State's *required* disclosures about unforeseeable risks to the woman are "abortion regulations designed to influence the woman's choice between abortion or childbirth" which this Court already has held are not carefully tailored to the State's legitimate goal of promoting maternal health and thus cannot justify the State's intrusion into the physician-patient relationship. *City of Akron*, 462 U.S. at 444. Finally, Section 3205(a) unequivocally requires the *physician* to supply information about health risks, thus preventing other qualified personnel from doing so. This Court in *City of Akron* clearly held that such a requirement is overbroad, 462 U.S. at 447-449, and therefore Section 3205(a) is unconstitutional for this additional reason.

B. Illinois' Informed Consent Provision Is Unconstitutional.

Section 2(10) of the Illinois Abortion Law of 1975, Ill. Rev. Stat. ch. 38, ¶ 81-22(10) (1983), defines "abortifacient" as any instrument, medicine, drug or any substance or device which is known to *cause fetal death* . . . whether or not the fetus is known to exist when such substance or device is employed" (emphasis added). Section 11(d) of the Illinois Abortion Law of 1975, Ill. Rev. Stat. ch. 38, ¶ 81-31(d) (1983), provides:

> Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.[30]

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[30] Although the reference to "fetal" death could be interpreted to limit the provision to an ordinary abortion performed during the first trimester, the term "fetus" is defined to include a fertilized egg. Section 2(a) of the Illinois Abortion Act of 1975, Ill. Rev. Stat. ch. 38, ¶ 31-32(g) (1983). Thus, the provision was clearly intended to regulate various forms of birth control.

1. *Medical Background.* There are a variety of artificial methods of birth control, and three of the most common and effective are directly affected by these Illinois provisions. Two methods—the intrauterine device and "the morning-after-pill" (stilbestrol)—are designed to work after fertilization. The former blocks the blastocyst (fertilized egg) from reaching the uterine wall and the latter causes contractions in the uterus that discourage implantation. J. Pritchard & P. MacDonald, Williams Obstetrics 819 (17th ed. 1985); Segal, *Absence of Chorionic Gonadotropin in Sera of Women Who Use Intrauterine Devices*, 44 Fertility and Sterility 214 (1985). The most common and effective birth control is the so-called "pill," which prevents pregnancy primarily by retarding ovulation through the use of hormones. But ovulation is not completely halted by the pill and so fertilization remains a possibility. As an additional set of protections, the pill's hormones also affect the ability of the fertilized egg both to reach the uterus and to implant itself. Mishell, *Control of Human Reproduction: Contraception, Sterilization and Induced Abortion* in Obstetrics and Gynecology 256 (D. Danforth ed. 1982); J. Pritchard & P. MacDonald, Williams Obstetrics 812-813 (17th ed. 1985).

With respect to the definition of "fetus," it is customary to refer to the human conceptus, from fertilization through the first 8 weeks of development, as an *embryo*, and from 8 weeks after ovulation until term, as a *fetus*. J. Pritchard & P. MacDonald, Williams Obstetrics 87 (17th ed. 1985); Kaiser, *Fertilization and the Physiology and Development of Fetus and Placenta*, in Obstetrics and Gynecology 317 (D. Danforth ed. 1982) (setting 11 weeks as the dividing line between embryo and fetus).

2. *Infringement.* Although the abortifacient disclosure requirement does not necessarily implicate a woman's decision whether to have an abortion, it clearly affects the woman's basic ability to make a treatment decision re-

garding birth control and modifies how the physician can and will consult with the patient. Thus, the law implicates precisely the same core privacy concerns regarding personal decisions about procreation as the laws in *Roe* v. *Wade*, *Griswold* v. *Connecticut*, *and Eisenstadt* v. *Baird*. Thus, under these decisions, the woman clearly has a fundamental privacy right in consultation with her physician to obtain and use an "abortifacient" as defined by Illinois law.

The "abortifacient" provision of Illinois law is obviously designed to, and unquestionably will, intrude into the patient-physician consultation process. The State compels the physician to describe as causing "fetal death" any birth control method which somehow prevents a fertilized egg from becoming implanted in the mother's uterine wall or dislodges the implanted blastocyst. Any effort by the State to dictate precisely what information a physician must convey to the patient involves a direct intrusion into the privacy of the physician-patient relationship. Moreover, by discouraging some women from using birth control, the State increases the health risk to the woman and thereby directly infringes her privacy right. The "risk of dying as the consequence of using an oral contraceptive is certainly less than that imposed by pregnancy and delivery." J. Pritchard & P. MacDonald, Williams Obstetrics 817 (17th ed. 1985).

3. *Compelling Interest Analysis.* Although Section 11(d) primarily regulates the prescription of birth control methods instead of the performance of abortions, the basic framework for evaluating infringements of the woman's privacy right derived from the abortion context applies equally to this provision. Accordingly, Section 11(d) can only be upheld if it is consistent with accepted medical practice and is carefully tailored to serve a compelling state interest. Otherwise this infringement of the woman's fundamental right is unjustified. It is clear that Section 11(d) cannot satisfy these standards. Because

the State did not appeal from the Seventh Circuit's judgment, the Court does not have the benefit of the State's own putative policy justification for enacting Section 11(d). Appellants imply (Br. at 11) that the provision is designed to spare women the trauma of a birth control technique that may cause the non-development or loss of a fertilized egg.

Although the mother's emotional health is unquestionably a legitimate concern to the state (just as it is often a dominant concern to the physician; *see* pp. 38-39, *infra*), it is not compelling unless the health risk the state seeks to prevent is greater than the risk created by compliance with the state's law. *See Roe* v. *Wade*, 410 U.S. at 149; *City of Akron*, 462 U.S. at 435-436. But for those women who forego a birth control method because of the required disclosure, the State's effort plainly increases the health risk to the woman. Moreover, this health risk is far easier to document than the appellants' speculative emotional trauma to a woman caused by non-disclosure of the possible loss of a fertilized egg, which no one can even say ever existed.[31] Thus, the State's interest, which it has chosen not to defend in this appeal, is not a compelling one.

But even assuming the woman's emotional health were a compelling interest of the State in this context, disclosure that invites every patient to believe that she may have an "abortion" if she uses a particular method of birth control is not reasonably related to that goal because it does not comport with accepted medical practices. *Cf.*, Cavanagh & Comas, *Spontaneous Abortion*, in Obstetrics and Gynecology 378 (D. Danforth ed. 1982) (physicians should describe "spontaneous abortion" to patient as "miscarriage" and avoid use of term "abortion" which

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[31] *See, e.g.*, Cates, Smith, Rochat & Grimes, *Mortality From Abortion and Childbirth: Are The Statistics Biased?*, 248 J.A.M.A. 192 (1982); Rubin, McCarthy, Shelton, Rochat & Terry, *The Risk of Child Bearing Re-Evaluated*, 71 Am. J. Pub. Health 712 (1981).

upsets patients.) As we explained in the context of Pennsylvania's informed consent statute, not every patient requires disclosure of certain information. Moreover, some women will take offense at the State's way of characterizing the birth control process, and may be particularly offended to have such a description coming from the mouth of their personal physician. *See City of Akron*, 462 U.S. at 445.

Nor is the requirement that the physician describe a birth control method in terms of "*fetal death*" consistent with accepted medical practice. As explained, medicine defines a fetus as being at least 8 weeks old, *see* p. 30, *supra*. *See also* Kaiser, *Fertilization and the Physiology and Development of Fetus and Placenta*, in Obstetrics and Gynecology 317 (D. Danforth ed. 1982) (implanted blastocyst is 0.36 x 0.31 mm). Moreover, describing a fertilized egg as having "died" may not be consistent with many physician's concept of death. Compare *City of Akron*, 462 U.S. at 444. Thus, contrary to appellants' claim (Br. at 16), this law does not prevent deception by the physician; instead, it carries a very serious potential for misleading and frightening unsuspecting women.

Finally, Section 11(d) is not a carefully tailored provision. No law that can be fairly construed to discourage every woman from using the most effective methods of available birth control is even rationally related, much less carefully tailored, to the state's legitimate interest in protecting maternal health. Accordingly, this provision is unconstitutional.[32]

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[32] There is an additional basis for holding this law unconstitutional. Section 11(d)'s vagueness directly violates the physician's right to due process. If the State chooses to employ its criminal laws to regulate physician-patient relationships, it must act with greater precision than it has here. No person of ordinary intelligence could do anything but guess as to what disclosures are re-

C. The Illinois and Pennsylvania Provisions Which Require Physicians to Use the Abortion Technique That Will Most Likely Preserve Fetal Life are Unconstitutional.

Section 3210(b) of Pennsylvania's 1982 Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3210(b) (Purdon 1983), requires the physician who performs an abortion on a fetus known to be viable to use the technique most likely to preserve fetal life unless, in the good-faith judgment of the attending physician, that method would pose a "significantly greater medical risk" to the mother's life or health. The statute expressly excludes potential psychological or emotional effects from the physician's consideration when judging the risk to the woman's life or health. Failure to comply with this section is a third degree felony.

Section 6(4) of the Illinois Abortion Law of 1975, Ill. Rev. Stat. ch. 38, ¶ 81-26(9) (1983), requires a physician who knows that there is a "possibility" of sustained survival by the fetus to employ the same professional skill to preserve the life and health of the fetus that he would be required to exercise toward a fetus intended to be born. Section 6(1) imposes the same requirement of fetal care on the physician, but imposes a harsher criminal penalty if the fetus is "known to be viable." [33]

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quired of him by Section 11(d) in prescribing most birth control methods. *Colautti* v. *Franklin*, 439 U.S. at 400-401.

The claims by the appellants and the United States that the physician "is free to get the message across in any way he chooses" simply highlights the uncertainty of the Illinois law. If the physician knows that the birth control method is an "abortifacient," but attempts "to get the message across" without actually mentioning "fetal death," which is the precise definition contained in the statute, it is not at all clear why a jury could not find that such action constituted a "reckless" failure to inform the patient that the prescribed method is an abortifacient as statutorily defined. Compare *Colautti* v. *Franklin*, 439 U.S. at 390-394.

[33] The Illinois provisions have been interpreted to require the physician to choose the method of abortion most likely to promote fetal survival. *Wynn* v. *Scott*, 449 F. Supp. 1302, 1321 (N.D. Ill.

1. *Medical Background.* A brief discussion of the medical practices concerning second and third trimester abortions is a necessary backdrop to an analysis of the constitutionality of these laws. "Viability" of the fetus can occur anytime between 22 weeks and 28 weeks after the last menstrual period, although the survival rates for the fetus are "meager" until at least 25 weeks. Hack, Fanaroff & Merkatz, *The Low-Birth-Weight Infant—Evolution of a Changing Outlook*, 301 New Eng. J. Med. 1162, 1164 (1979); Philip, Little, Polivy & Lucey, *Neonatal Mortality Risk for the Eighties: The Importance of Birth Weight/Gestational Age Groups*, 68 Pediatrics 122, 124-125 (1981). *See also City of Akron*, 462 U.S. at 457 n.5 (O'Connor, J., dissenting).

There are two primary abortion procedures during the period surrounding viability—saline amnioinfusion and prostaglandin instillation. Both procedures involve injections by the physician into the amniotic sac surrounding the fetus which cause the uterus to contract and the fetus to be discharged. There are, however, two additional common methods of abortion—hysterotomy, which is much like a "mini" cesarean section for childbirth, and dilatation and evacuation ("D&E"), which involves the use of forceps to evacuate the fetus and suction to ensure that the cavity is empty.[34] Like every medical procedure, these techniques carry their own risks for the mother and have their own effects on the fetus.[35]

1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979). In addition, both statutes have been interpreted not to require the physician to increase the "risk to the woman['s health] to save the fetus." 449 F. Supp. at 1321.

[34] Grimes & Cates, *Dilatation and Evacuation*, in Second Trimester Abortion 127-128 (G. Berger, W. Brenner & L. Keith eds. 1981); Anderson, Gibson & Hobbins, *Obstetric Management of the High Risk Patient*, in Medical Complications During Pregnancy 102 (G. Burrow & T. Ferris 2d ed. 1982).

[35] To simplify matters, we will focus on the four methods of abortion described in the text because they are the most commonly used. In fact, there are other methods. For example, prostaglandin can

Saline amnioinfusion does create a small risk of hemorrhage and infection to the woman, particularly if the abortion is only partially complete.[36] In addition, if the procedure is done incorrectly and the sodium solution gets into the vascular system, it can cause hypernatremia (an excessive increase in the blood sodium level), which in rare instances can be quite serious and even cause death to the mother.[37] Saline amnioinfusion is contraindicated for women with cardio-vascular disease or severe anemias. R. Bolognese & S. Corson, Interruption of Pregnancy—A Total Patient Approach 126 (1975). Saline amnioinfusion is also very likely to result in fetal death; two scientists reported live births at a rate of much less than one per 100 abortions for this procedure. Stroh & Hinman, *Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York*, 126 Am. J. Obstetrics & Gynecology 83 (1976).

Use of prostaglandins also carries a small risk of hemorrhage and infection, particularly if the placenta is not

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be administered vaginally or even intravenously; also urea can be used instead of, or with, prostaglandins; and a hysterectomy also has been performed in extraordinary circumstances. *See* Bydgeman, *Prostaglandin Procedures*, in Second Trimester Abortion 89, 95-99 (G. Berger, W. Brenner & L. Keith eds. 1981); Kerenyi, *Intra-Amniotic Techniques*, in Abortion and Sterilization: Medical and Social Aspects 369 (J. Hodgson ed. 1981). Each method, of course, carries different risks to the woman depending on her condition.

[36] Kerenyi, *Hypertonic Saline Instillation*, in Second Trimester Abortion 83 (G. Berger, W. Brenner & L. Keith eds. 1981).

[37] *Id.* It is this risk that may make saline amnioinfusion slightly less safe to the mother than use of prostaglandins. Grimes & Cates, *Complication from Legally-Induced Abortions: A Review*, 34 Obstetrical & Gynecological Surv. 177, 188 (1979). *But see* Bygdeman, *Prostaglandin Procedures*, in Second Trimester Abortion 89, 95-99 (G. Berger, W. Brenner & L. Keith eds. 1981) (indicating that prostaglandin caused both more complications and more major complications than saline amnioinfusion). If the saline injection is properly administered, however, the risk to the mother should be about the same with either procedure.

expelled soon after the fetus.[38] There is, however, no risk of hypernatremia. Prostaglandin instillation does have side effects, such as nausea, vomiting and diarrhea.[39] Use of prostaglandin instillation is not recommended for patients with bronchial asthma, other pulmonary problems, glaucoma or epilepsy.[40] Prostaglandin instillation is also quite likely to cause fetal death, but less so than a saline injection; there can be as many as 3 or 4 live births per 100 abortions. Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterilization 156, 164 (J. Hodgson ed. 1981).[41]

As this Court noted in *City of Akron*, D&E has become the abortion procedure of choice in the early portion of the second trimester. 462 U.S. at 436. But D&E can be used as late as 24 weeks.[42] D&E is generally accepted as

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[38] Kerenyi, *Intra-Amniotic Techniques*, in Abortion and Sterilization: Medical and Social Aspects 359, 367 (J. Hodgson ed. 1981).

[39] *Id.*

[40] Hern, *Mid-Trimester Abortion*, in Obstetrics & Gynecology Ann. 375 (1981); Robins & Surrago, *Alternatives in Mid-Trimester Abortion Induction*, 56 Obstetrics & Gynecology 716 (1980).

[41] *See* American College of Obstetricians & Gynecologists, Tech. Bull. No. 56, *Methods of Midtrimester Abortion* 4 (Dec. 1979); Lee & Baggish, *Live Birth as a Complication of Second Trimester Abortion Induced with Intra-Amniotic Prostaglandin*, 13 Advances in Planned Parenthood 7 (1978); Stubblefield, Noftolin, Frigoletto & Ryan, *Laminaria Augmentation of Intra-Amniotic PGF2 For Midtrimester Pregnancy Termination*, 10 Prostaglandins 413, 420 (1975).

[42] Stubblefield, *Midtrimester Abortion by Curettage Procedures: An Overview*, in Abortion and Sterilization: Medical and Social Aspects 280 (J. Hodgson ed. 1981); Kleiman, *When Abortion Becomes Birth: A Dilemma of Medical Ethics Shaken by New Advances*, N.Y. Times, Feb. 15, 1984, at Bl, col. 1; ACOG, Tech. Bull. No. 56, *Methods of Midtrimester Abortion* (Dec. 1979); Rooks & Cates, *Emotional Impact of D&E* v. *Instillation*, 9 Fam. Plan. Persp. 276-277 (1977). The primary risk caused by later uses of D&E is perforation of the cervix or uterus. Mandelman & Kerenyi, *Medical*

a very safe abortion method and it is also likely to cause the woman much less emotional trouble than the saline amnioinfusion or prostaglandin methods, because it allows the woman to avoid the long and painful labor associated with the other procedures.[43] As the Court pointed out in *Planned Parenthood* v. *Ashcroft*, however, D&E is absolutely fatal to the fetus. 462 U.S. at 483 n.7.

An abdominal hysterotomy is a major surgical procedure and is not accepted as a method of pregnancy termination if any other method is available. J. Pritchard & P. MacDonald, Williams Obstetrics 481-482 (17th ed. 1985). A hysterotomy does no special damage to the fetus, however, and therefore, as a method of pregnancy termination, it provides the greatest likelihood of fetal survival. *See Colautti* v. *Franklin*, 439 U.S. at 398.

2. *Infringement.* Against this background, it is plain that each of the three statutes interferes with the physician's ability to practice medicine on behalf of the patient. With respect to the Pennsylvania law, this Court recognized, even before *Roe* v. *Wade*, *supra*, that the physician's obligation to preserve his patient's health required the physician to consider both the psychological as well as physical well-being of the patient and that judgments concerning both always precede every medical procedure. *United States* v. *Vuitch*, 402 U.S. 62, 72 (1971).[44] Thus, for the State to declare, as Pennsylvania has in enacting

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and Surgical Aspects of Elective Termination, in Rovinsky & Guttmacher's Medical, Surgical and Gynecological Complications of Pregnancy 698 (S. Cherry, R. Berkowitz & N. Kase eds. 1985).

[43] Grimes & Cates, *Dilatation and Evacuation*, in Second Trimester Abortion 128 (G. Berger, W. Brenner & L. Keith eds. 1981).

[44] The importance of the physician's ability to consider all health consequences, including emotional and psychological components, has been repeatedly emphasized by the Court since *Roe* v. *Wade*. *See, e.g.*, *Roe* v. *Wade*, 410 U.S. at 153; *Doe* v. *Bolton*, 410 U.S. at 196; *Beal* v. *Doe*, 432 U.S. 438, 442 (1977); *Colautti* v. *Franklin*, 439 U.S. at 400; *H. L.* v. *Matheson*, 450 U.S. at 397-398, 411.

Section 3210(b), that the physician must ignore emotional and psychological considerations strikes at the core of the physician's duty to provide total treatment for the patient.[45]

In addition, the Court already has held that the physician's primary duty must always be to his patient, the woman. *Colautti* v. *Franklin*, 439 U.S. at 400-401. Here Pennsylvania requires the physician to consider primarily the fetus and be concerned about the patient, only if her physical well-being is "significantly" affected. This, of course, directly regulates, and unquestionably burdens, the physician's provision of medical care to the patient.

Both Sections 6(1) and 6(4) of the Illinois law also directly infringe upon the practice of medicine. They impose upon physicians a burden of care toward the fetus that arises at the time of the abortion procedure itself. While the statutes have been interpreted to give primary concern to the mother's health (*see* note 33, *supra*), they nevertheless affect the decisionmaking process at a critical time for the patient and require the physician to follow statutory criteria rather than professional judgment in deciding upon a course of treatment. In addition, all three provisions attach criminal liability to the determination of "viability" which holds great potential for chilling the physician's medical practices. *Colautti* v. *Franklin*, 439 U.S. at 395. Accordingly, all three statutes infringe upon the fundamental privacy right.

3a. *Compelling Interest Analysis.* To withstand constitutional scrutiny, therefore, each provision must be con-

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[45] *See, e.g.*, Mandelman & Kerenyi, *Medical and Surgical Aspects of Elective Terminations*, in Rovinsky & Guttmacher's Medical, Surgical and Gynecological Complications of Pregnancy 698 (S. Cherry, R. Berkowitz & N. Kase eds. 1985); Laufman, *Surgical Judgment*, in Christopher's Textbook of Surgery 1459 (L. Davis 9th ed. 1968); Nehemiah, *Psychological Aspects of Surgical Practice*, in Surgery: A Concise Guide to Clinical Practice 9 (G. Nardi & G. Zunidema 3d ed. 1972).

sistent with accepted medical practice and be carefully tailored to the states' compelling health interests. Under these standards, none of these state laws is constitutional.

On the merits, the Court can summarily dispose of Section 6(4) of the Illinois Abortion Act. The provision is virtually identical to a Pennsylvania statute declared unconstitutional by this Court in *Colautti* v. *Franklin*, 439 U.S. at 379-380. By requiring the physician to take into account the health of the fetus prior to actual viability, the state law seeks to protect fetal life before the State has any compelling interest in that purpose under this Court's prior rulings. *Roe* v. *Wade*, 410 U.S. at 163. Moreover, imposing duties that distract from the care of the woman is not reasonably related to the State's interest in maternal health. Accordingly, the Illinois provision is patently unconstitutional.[46]

b. Pennsylvania's Section 3210(b) is almost as easily disposed of by this Court on the basis of its prior decisions. Although the statute is properly aimed at preserving fetal life after viability, it is not reasonably related to the State's permissible goals because it is not consistent with accepted medical practice. First, the statute eliminates as a legitimate consideration the mother's emotional health. The absolute elimination of emotional considerations invalidates this statute in light of the Court's repeated insistence that "health" requires consideration of everything relevant to a patient's condition. *See* notes 44 and 45, *supra*.

Moreover, it will be very difficult in any given case for the physician in choosing among abortion methods to make

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[46] The abortion method of choice for all pre-viability abortions during the second trimester is or is fast becoming D&E because of the advantages of that procedure to the patient. *See* p. 37, *supra*. Accordingly, to the extent Section 6(4) would impose any restriction upon the physician's decision to choose D&E prior to viability, it would be inconsistent with accepted medical practices and therefore unconstitutional for that additional reason.

the "good faith" judgment Section 3210(b) commands. All methods of abortion at this stage of pregnancy carry risks to the mother, and all but one ordinarily cause the fetus to die. Instead of allowing the mother and physician to evaluate these risks and make a judgment about how best to proceed, Pennsylvania *requires* the physician to make the treatment decision on the basis of a trade-off between maternal and fetal health, which this Court has declared impermissible in both *Colautti* v. *Franklin*, 439 U.S. at 400, and *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 n.8 (Powell, J.).

The State's analysis in support of this provision is wholly inadequate. The Pennsylvania Attorney General attempts to rewrite the statute so that the physician is not required to favor fetal health over maternal health. By reading the word "significantly" out of the statute, Pennsylvania attempts to avoid the statute's clear inconsistency with accepted medical practices. *Colautti* v. *Franklin*, 439 U.S. at 400; *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 n.8 (Powell, J.). Concededly, the Court has an obligation to avoid unconstitutional constructions of state law. *See, e.g., Planned Parenthood* v. *Danforth*, 428 U.S. at 64; *Bellotti* v. *Baird*, 443 U.S. at 645 & n.25; *H.L.* v. *Matheson*, 450 U.S. at 406, 407 & n.14, 412. Nevertheless, it must give the statute a "fair" interpretation, and reading a word completely out of the statute, as Pennsylvania proposes, violates a fundamental canon of statutory construction. *See, e.g., McDonald* v. *Thompson*, 305 U.S. 263, 266 (1938); *D. Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932).[47] Accordingly, Section 3210(b) is unconstitutional.

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[47] Even if the Court were to accept the Pennsylvania Attorney General's construction of Section 3210(b), it would not preserve the constitutionality of this provision. As we explain later, any statute that imposes a duty on the physician concerning the life of the fetus will necessarily increase the risk to the woman in violation of the accepted medical practice of first protecting the life and health of the mother. *See* pp. 42-43, *infra*.

c. Although Sections 6(4) and 3210(b) can be readily disposed of on the basis of prior decisions of this Court, Section 6(1) poses the basic issue of whether the State, through its criminal laws, can impose upon the physician, who has decided that a post-viability termination of the woman's pregnancy is *necessary* to her life or health, an independent duty to the fetus that arises during the pregnancy termination process.

Amici submit that the State's intrusion into the physician's exercise of judgment in this situation cannot be justified because the physician's primary duty must be to protect the life and health of the mother. Section 6(1) only applies to terminations of pregnancy after the fetus is believed to be viable.[48] Thus, the termination must be necessary to the mother's life or health. One of the main textbooks in the field lists among the "commonly accepted" conditions that warrant a therapeutic abortion: persistent heart disease, advanced hypertensive vascular disease and invasive carcinoma of the cervix. J. Pritchard & P. MacDonald, Williams Obstetrics 477 (17th ed. 1985); Nesbitt & Abdul-Karim, *Coincidental Disorders Complicating Pregnancy*, in Obstetrics and Gynecology 511 (D. Danforth ed. 1982). Obviously, these are conditions that warrant the physician's immediate and dominant concern. *See* H. Barber & E. Graber, Surgical Disease in Pregnancy 697 (1974) (physician's primary concern must be for the mother who has cancer).

It is irrational—and certainly not tailored to any health concerns—for the State to require the physician to give weight to fetal survival in deciding which of the three most common abortion methods to choose when the

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[48] No one can "know" when a fetus is viable. The most that a physician could say is that to "a reasonable medical certainty" a fetus has become viable. We agree with the court of appeals that the failure of the state legislature in *1975* to make clear that the viability determination must be made by the physician is fatal to this provision. *See Colautti* v. *Franklin*, 439 U.S. at 391-393.

mother's health or even life is at such extreme risk. All three common methods are *extremely likely* to cause the death of the fetus. *See* pp. 35-38, *supra*. This Court already has recognized that "[m]any" post-viability abortions will "be emergency operations" in which the physician will have to make a very quick judgment concerning which abortion method to choose in light of the mother's particular life or health threatening condition and the physician's own medical skills. *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 (Powell, J.). As *amici* have already explained, each abortion method carries its own particular risks and those risks must be evaluated in the context of each patient's particular condition. *See* pp. 35-38, *supra*. *Amici* submit that these considerations alone should guide the physician's determination; otherwise, there will always be an increased risk of harm to the mother.

This preference for the mother's health, which this Court has clearly approved, *Colautti* v. *Franklin*, 439 U.S. at 400-401; *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 (Powell, J.), is particularly warranted because no abortion method even minimally advances the State's interest in fetal health. Except for a hysterotomy which causes a "significantly" greater risk, however defined, to the mother, all other methods will cause fetal death in almost all cases. The fact that prostaglandin instillation is less likely to cause fetal death than saline amnioinfusion (*Colautti* v. *Franklin*, 439 U.S. at 399) should not mask the much more important fact that both methods are *extremely likely* to result in the death of the fetus. Therefore, it makes no medical sense to inject this consideration as a decisive factor into the physician's calculations in choosing how best to treat a seriously ill woman.[49]

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[49] Appellants' facile characterization (Br. at 36, 41) of Section 6(1) utterly ignores all medical reality. They assert that the statute merely imposes a duty on a physician, when all other considerations are equal, to decline to choose an abortion method that is injurious

Amici do not mean to suggest that the State cannot enact laws to serve its compelling interest in the survival of the fetus. The State can protect that interest by requiring the physician who performs an abortion after viability to certify that the abortion was necessary to protect the mother's life or health, *Roe* v. *Wade*, 410 U.S. at 163-164, *and* by requiring hospitals, when appropriate, to take measures, such as use of a second physician, to assist the infant who survives the termination of pregnancy. *Ashcroft*, 462 U.S. at 485-486. These measures are tailored to the State's compelling interest and do not interfere with the physician's judgment at a critical time in the woman's treatment. Because Section 6(1), by contrast, is clearly inconsistent with sound medical practice, it is not reasonably related to the State's permissible health goals and is thus unconstitutional.

D. Pennsylvania's Second-Physician Requirement Must Contain An Exception For Emergency Abortions.

Section 3210(c) of Pennsylvania's 1982 Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3210(c) (Purdon 1983), requires the mother's attending physician to arrange for a second physician to be in attendance if the chosen method of abortion "does not preclude the possibility of the child surviving the abortion. . . ." The purpose of the second physician is to take control of the child and become his or her primary provider of care.

In *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485-486, this Court upheld a provision in the Missouri abortion statute that imposed a somewhat similar second-physician requirement. The Court, however, required that the statute contain a clear exception to the requirement of a second physician whenever the abortion was an emergency procedure. When the mother's health is at risk, the

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to the fetus. What this assumes is that all other considerations will be equal. But this is not consistent with medical practice. The physician's concern is and should be with the mother until after the mother's life or health are no longer in jeopardy. *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 (Powell, J.).

attending physician's concern should be exclusively on the mother and not be distracted by the need to obtain a second physician before going ahead with the needed medical care. *Id.* For the reasons stated by the Court in *Ashcroft*, *amici* strongly support the importance of an emergency exception. Thus, Section 3210(c) is only constitutional if the statute somewhere contains a clear emergency exception.

Pennsylvania asserts that the affirmative defense provision in its statute, § 3210(a), which bars conviction if the physician concluded in good faith that the abortion was necessary to preserve the mother's life or health, can be interpreted as an emergency exception to the second-physician requirement. But, Pennsylvania's law is not as clear as Missouri's statute in *Ashcroft*; Section 3210(a) says nothing specifically about the second physician and it is a *defense* to a criminal prosecution for performing an abortion on a post-viable fetus and not part of the second-physician requirement itself. Accordingly, *amici* submit that the court of appeals properly held that the provision was insufficiently clear and thereby correctly required a more carefully drafted emergency exception.

E. Pennsylvania's Abortion Reporting Requirement Is Unconstitutional.

Section 3214 of Pennsylvania's 1982 Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3214 (Purdon 1983), requires every physician who performs an abortion to report certain information to the State. Within a month of the procedure, the physician must submit a report that specifies the referring physician, agency or service; the facility where the abortion was performed; the political subdivision and state in which the woman resides; her age, race and marital status; the number of her prior pregnancies; the date of her last menstrual period; the "probable gestational age of the unborn child"; the type of abortion procedure performed; any complications; the "length and weight of the aborted unborn child when measurable"; the basis for any judg-

ment that the abortion was required because of a medical emergency; and the basis for the physician's determination that the fetus was not viable or that a post-viability abortion was necessary to preserve the mother's life or health. 18 Pa. Cons. Stat. Ann. §§ 3211, 3214 (Purdon 1983). Failure to provide this information is a first degree misdemeanor; in addition, failure to provide information about viability constitutes "unprofessional conduct," and will result in at least a three-month suspension of the physician's medical license.

1. *Infringement.* This Court already has held that a state can require physicians to supply it with routine reports concerning each abortion because such reports ordinarily constitute "minor" regulation of the physician's practices and the reports reasonably further the state's interest in health by providing the state with aggregate data regarding various abortion procedures. *Planned Parenthood* v. *Danforth*, 428 U.S. at 80. But this Court in *Danforth* made clear that such reports could not regulate the physician's judgment or be too burdensome, *id.* at 80-81, and reiterated this point in *City of Akron*, 462 U.S. at 430 n.13 (recordkeeping is permissible "if not abused or overdone. . .").

Amici do not object to reporting requirements if they are restricted to factual material about each abortion which are carefully tailored to a legitimate state goal. Physicians routinely fill out reports for states, such as death certificates and child abuse and drug abuse reports. M. Lewis & C. Warden, Law and Ethics in the Medical Office Including Bioethical Issues 56-58 (1983). Unlike the routine forms required in those contexts, Pennsylvania demands that a physician explain in writing the bases for his judgment about the viability of a fetus and his choice of abortion procedure. These reports are therefore not limited to routine factual materials. Moreover, the physician must supply this information without the slightest idea what use the State may make of it and without being given guidance regarding the level of detail which the State expects or wants.

Thus, the State's requirement seems intended to discourage physicians from performing abortions and will have that effect by requiring them to devote time to drafting reports, under vague criteria, that could better be spent treating patients. J.S. App. at 79a-81a; *Cf.*, *Parham* v. *J.R.*, 442 U.S. 584 (1979) (psychiatrist time better spent practicing medicine than testifying at commitment hearings). In addition, the State's requirement will increase the cost to a woman who has an abortion as opposed to any other medical procedure; the abortion procedure is uniquely burdened by the State's reporting requirement of a physician's professional "judgments."

2. *Compelling Interest Analysis.* Pennsylvania's reporting provision is invalid because it is not carefully tailored to a compelling state interest. The Pennsylvania Attorney General asserts that these reports could be a source of data that could be used for research. (Pa. Br. at 60-61.) But the statute nowhere mentions how these reports will be used by the State, and no legislative history is cited to show that the legislature intended the judgmental portions of the reports to be used for any purpose other than to burden the physician. Nor does the Attorney General attempt to suggest, even in theory, how unstructured answers describing professional judgments underlying a physician's treatment decisions can be used as a data base for serious scientific research by the State or anyone else.

In sum, when a state seeks to force physicians to report on the basis for the exercise of their medical judgment, the state must show that its use of reported information is carefully tailored to the state's interest in maternal health, and Pennsylvania cannot satisfy that requirement because of the vagueness of its requirement and the lack of any rational connection, much less a carefully tailored one, to the state's interest in advancing maternal health.

CONCLUSION

For the reasons stated above, the judgments of the courts of appeals should be affirmed.

Respectfully submitted,

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No. 84-1379

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,
Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,
Appellees,

and

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT AND SUPPLEMENTAL BRIEF

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On Appeal from the United States Court
of Appeals for the Seventh Circuit

APPELLANTS' MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

Appellants Eugene F. Diamond and Jasper F. Williams, by their attorneys hereby respectfully move this Court for

leave to file a supplemental brief after oral argument. In support thereof, they state:

1) This case was argued on November 5, 1985.

2) A significant portion of the questions at oral argument centered around this Court's jurisdiction in this case and Appellants' interests in taking this appeal.

In response to questions concerning the interests of Appellants, the Court was made aware of the fact that there was a substantial award of attorney's fees pending against Appellants in this case. That award of fees could only be reduced in amount if Appellants were allowed to pursue this appeal. If Appellants prevailed upon the issues on appeal, the fees associated with this appeal and the appeal in the Seventh Circuit could not

be assessed against Appellants since Appellees would not have prevailed on those issues. See, Hensley v. Eckerhart, 461 U.S. 424 (1983).

3) At the time of oral argument, no final judgment with respect to the liability of Appellants for attorney's fees had been rendered.

4) Appellees suggested that there was a possibility that the district court would not hold Appellants liable for attorney's fees and that Appellants could not rely on the possibility of an award of fees as an additional basis for their asserted interests in this appeal.

5) The District Court issued its decision on March 6, 1986 holding Appellants liable for attorney's fees in the amount of $100,530.84. Charles v. Daley, Nos. 79-C-4541, 79-C-4548 (N.D. Ill. filed Mar. 6, 1986). See, Appendix

Thus, there is now a final judgment with respect to Appellants' liability for attorney's fees.

6) In addition to the other interests set forth in Appellants' reply brief concerning the continuing existence of a justiciable case or controversy, properly presented by Appellants in this case, is the specific and substantial pecuniary interest of Appellants in avoiding an award of attorney's fees.

Wherefore, Appellants request that their Motion for Leave to File a Supplemental Brief After Oral Argument be granted.

Respectfully submitted,

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DATED: March 18, 1986

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 84-1379

EUGENE F. DIAMOND, M.D. and
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vs.

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and

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

APPELLANTS' SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

ARGUMENT

This case was argued on November 5, 1985. A significant portion of the questions at oral argument centered around this Court's jurisdiction in this

case and Appellants' interests in taking this appeal. The purpose of this brief is twofold: 1) to inform this Court that a final decision holding Appellants liable for attorney's fees in the amount of $100,530.84 has been rendered, see, Appendix, and 2) to explain the significance of that decision with regard to Appellants' interests in taking this appeal.

In Hensley v. Eckerhart, 461 U.S. 424 (1983), this Court held that fees cannot properly be awarded for work done on unsuccessful claims. The issues on appeal before this Court are separate and distinct from the issues which were not appealed in this case. Should this Court reverse the Court of Appeals and uphold the constitutionality of the challenged provisions, Appellees could not be said to have prevailed on those issues. Accor-

dingly, the award of fees against Appellants would have to be reduced substantially.[1]

Appellants set forth a number of arguments in their reply brief concerning the continuing existence of a justiciable case or controversy in this case and continue to rely on those arguments. Appellants now have an additional interest to protect by taking this appeal--securing a reduction in the substantial amount of fees for which they have been held liable.[2]

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1. The amount would have to be reduced almost 10% for work done on these unsuccessful claims in the Court of Appeals alone. An additional amount should be deducted for work done on these issues in the District Court.

2. Although Dr. Williams died in a plane crash last April, a claim for the full amount of attorney's fees already has been filed against his estate.

CONCLUSION

For the above reasons and those set forth in Appellants' Reply Brief, a justiciable case or controversy does exist for this Court to review and the case should not be dismissed.

Respectfully submitted,

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DATED: March 18, 1986

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 79 C 4541
	)	
DALEY, et al.,	)	
	)	
Defendants.	)	
	)	
HOPE CLINIC FOR WOMEN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 79 C 4548
	)	
HARTIGAN, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the court on the intervening defendants' motion to amend this court's order of April 22, 1985, which apportioned plaintiffs' fees award equally between the State defendants and the intervening defendants. The intervenors, in an earlier motion, asked

the court to amend its order in light of the Supreme Court's ruling in Kentucky v. Graham, 105 S.Ct. 3099 (1985). Therefore, on October 21, 1985, the court directed the parties to brief the issue. For the reasons which follow, the intervenors' motion to amend is denied.

In its original ruling on the issue of whether the intervenors, as private parties, could be assessed attorneys' fees under section 1988, this court found that although intervenors could not have been named defendants, once they chose to enter the suit as a party, fees were taxable against them. Charles v. Daley, Nos. 79 C 4541 & 79 C 4548, Mem. Op. at 3 (N.D. Ill. April 22, 1985), citing Vulcan Society of Westchester County v. Fire Department, 533 F.Supp. 1054, 1062 (S.D. N.Y. 1982). Further, it rejected arguments that because the State defendants

were available to pay the fees in full or had failed to seek contribution for fees from intervenors, they should bear the full liability for the fees. Therefore, the court split the award for fees equally between the State defendants and intervenors.

Further support for the court's initial ruling can be found in the rationale of Akron Center for Reproductive Health, et al. v. City of Akron, et al., 604 F.Supp. 1268 (N.D. Ohio 1984). In Akron, the intervening defendants were private individuals who joined in the defense of an Akron city ordinance regulating abortions performed on minor women. The court limited the intervenors' participation to issues directly affecting the scope of their intervention, but with regard to other issues, the intervenors were limited to amicus

curiae briefs. Id. at 1272.

The Akron court found the intervenors had voluntarily chosen to align themselves with the city-defendants and by doing so "contributed to the effort required of plaintiffs to substantiate their position in Court." Id. at 1273. The court rejected arguments similar to those advanced here--that the intervenors took no actions to violate plaintiffs' rights and that an award of fees would stop them and others from performing a valuable public function by defending such statutes. The Akron court and this court have rejected these arguments and found intervenors' inability to provide the relief sought by plaintiffs does not constitute a ground for denial of fees. Further, the intervenors could fulfill their public function of developing law and promotin g constitutional values by

acting in th role of amicus curiae.

Additionally, the Akron case cites authority in the Northern District of Illinois which supports this court's position, as well as the specific proportionment of the attorney's fees. Intervenors argue the Akron case is inapposite because the court there awarded a "mere 5% of the total fee award against the intervening defendants." Reply Mem. at 4. In Wynn v. Scott, No. 75 C 3957 Mem. Op. (N.D. Ill. Jan. 11, 1980), Judge Marshall had one of the intervenors from the present action acting as an intervenor in a similar action--a challenge to the Illinois abortion Acts of 1975 and 1977. Plaintiffs sought their fees only from the State defendants and not the intervenors. The Wynn court found that the plaintiffs could not place the full

burden of the fees on the State. Instead, the court reasoned that Dr. Diamond intervened, vigorously contested plaintiffs' position, and pursued an appeal to the Seventh Circuit and, therefore, the State defendant "should not be held responsible for any more than 50% of the amount which we have concluded would be reasonable award in this case." Mem. Op. at 6 (emphasis added).

The intervenors now ask the court to review its earlier reasoning in light of the Supreme Court's holding in Kentucky v. Graham. In Graham, the plaintiffs alleged a deprivation of their federal rights as a result of excessive force used against them during a raid and arrest. They filed a section 1983 suit seeking money damages against the Commissioner of the Kentucky State Police and seeking only recovery of fees from

the Commonwealth of Kentucky. The district court dismissed the Commonwealth as a party because it enjoyed immunity under the Eleventh Amendment. The suit was settled during trial in favor of the plaintiffs, who then moved to recover their fees as prevailing parties against the Commonwealth. The district court granted the fees requested and the Sixth Circuit Court of Appeals affirmed the award.

On appeal, the Supreme Court reversed, finding that section 1988 will not allow attorneys' fees to be recovered from a governmental entity where the prevailing plaintiff sues the governmental employees in their personal capacities only. The Court viewed the case as one requiring it to distinguish between personal and official capacity suits within the context of section 1988

fees. Because the Graham plaintiffs sued and prevailed against the employees in their personal capacity only, the plaintiffs won against the individual employees, not the entity which employed them. To permit the plaintiffs to recover fees against the government as a result of prevailing againt the employees in their personal capacity would destroy the distinction between personal and public capacity suits against governmental officials and would be inconsistent with Monell's doctrine that a municipality cannot be liable under section 1983 on the basis of respondeat superior. The Court concluded that only a prevailing official capacity action plaintiff is entitled to look for relief on the merits and for the fees from a governmental entity. The Eleventh Amendment prevented the Commonwealth from

being a party to the suit and, therefore, the fees award against it was reversed.

The intervenors analogize their position to that of the Commonwealth in that neither could be the party legally responsible for relief on the merits. The Commonwealth enjoyed immunity and the intervenors could not provide the injunctive relief plaintiffs sought. Further, they note that the act of intervening does not convert them into a party responsible for fees. "That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone a non-party." Graham, 105 S.Ct. at 3106. Therefore, the intervenors conclude that they and the Commonwealth share similar positions as parties who cannot be liable under section 1983 and cannot, therefore, be liable for section 1988 fees.

The court is not persuaded that the Graham decision requires it to amend the fees award. First, the court notes that the Commonwealth was a named defendant and was then dismissed as a party from the case. Hence, the Graham plaintiffs were seeking fees from a non-party who could not and should not have been pulled into the suit. The intervenors in this case could not have been named parties, but chose to become full parties to the litigation by intervening and refusing the role of amicus curiae. As this court, the Akron court, and the Wynn court have observed, once the intervenors chose to enter the suit and to become parties, they placed themselves in a position to bar plaintiffs from gaining the relief they sought. Therefore, they stand in a different position than the Commonwealth in Graham. The intervenors

are not named parties or non-parties, but individuals who voluntarily became fully participating parties. The Commonwealth was a non-party and decided to remain a non-party by refusing to waive its immunity.

Second, the intervenors' inability to enforce the abortion law does not grant them total immunity from fees once they become parties to the suit. This inability does raise issues about intervenors' standing to appeal the Seventh Circuit's decision to the Supreme Court once the State defendants determined not to appeal. Therefore, intervenors may lack Article III standing and lack the ability to enforce the challenged law, but they did <u>not</u> lack the ability to pose a "substantial barrier" to plaintiffs' realization of their constitutional rights during litigation before this

court. In contrast, the Commonwealth's immunity and decision not to waive its immunity eliminated its ability to prevent the Graham plaintiffs from the relief they sought.

For these reasons, the court finds that the Graham decision does not require that this court amend its fees award. The rationale underlying the fees apportionment in this case and others is not disturbed by Graham's holdings and conclusions concerning section 1988 fees and personal capacity suits against government employees.

/s/
Charles P. Kocoras
United States District Judge

Dated: Mar. 6, 1986

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1379

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,
Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,
Appellees,

and

THE HOPE CLINIC FOR WOMEN, LTD., et al.,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A RESPONSE TO APPELLEES' CITATION OF NEW AUTHORITY

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MOTION FOR LEAVE TO FILE A RESPONSE TO
APPELLEES' CITATION OF NEW AUTHORITY

Appellants Eugene F. Diamond and Jasper F. Williams, by their attorneys, respectfully move this Court for leave to submit a supplemental brief in response

to appellees' Supplemental Brief citing new authority. In support of this motion, appellants state:

1. Appellees seek leave to respond to the analysis of this Court's opinion in Bender v. Williamsport Area School Dist., No. 84-773 (Date of Opinion, March 25, 1986) that is presented in the Supplemental Brief of appellees. The appellees contend that under Bender, the appeal in this case should be dismissed. Appellants wish to respond to this contention.

2. Appellants also seek to respond to appellees' characterization of the proceedings in the district court on the issue of attorneys' fees. By edited quotation of a sentence in the opinion of the district court, appellees have created the inaccurate impression that the conduct of the appellants during the

course of this litigation may have amounted to bad faith and thus created a separate basis for the award of attorneys' fees.

WHEREFORE, appellants respectfully request this Court for leave to file this Supplemental Brief in response to appellants' citation of new authority and supplemental brief.

Respectfully submitted,

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April 4, 1986

TABLE OF AUTHORITIES

Bender v. Williamsport Area School District, No. 84-773 (Slip opinion, dated March 25, 1986.
. . . . . passim

Charles v. Daley, No. 79 C 4541 and 4548, N.D. Ill. (Memorandum Opinion, April 22, 1985).
. 7

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SUPPLEMENTAL BRIEF IN RESPONSE TO
APPELLEES' CITATION OF NEW AUTHORITY

Contrary to the arguments set forth in the appellees' citation of new authority, the decision of this Court in Bender v. Williamsport Area School District, No. 84-773, (Opinion Date:

March 25, 1986) does not support the dismissal of this case for lack of jurisdiction under Article III of the Constitution. Bender is clearly distinguishable from the situation in the case at hand. A brief review of the salient points of the Bender decision demonstrates that this Court is well aware of those distinctions.

Bender involved an appeal from an adverse district court opinion by a lone dissenting member of the Williamsport School Board, Mr. Youngman. Although the suit was brought against Mr. Youngman in both his official and personal capacities, this Court noted that there is nothing in the record or the district court judgment "to support the suggestion that relief was sought against any School Board member in his or her individual capacity. Slip op. at 8. This Court

also held that Mr. Youngman, as the lone dissenting vote in the School Board's decision not to appeal, could not "step into the shoes of the Board" and invoke its right to appeal. Slip op. at 9.

Finally, this Court rejected the contention that Mr. Youngman's status as an alleged "aggrieved parent" of a Williamsport High School student created a "case or controversy" sufficient for purposes of Article III. There was nothing in the record to support this asserted basis for jurisdiction, and Mr. Youngman had failed to file an appropriate motion to intervene pursuant to Fed. Rule Civ. Proc. 24. Slip. op. at 13-14.

The position of the appellants in this matter is easily distinguishable from that of Mr. Youngman. Unlike Mr. Youngman, Dr. Diamond and Dr. Williams

had, upon filing of a Rule 24 motion setting forth their specific interests in this case, been granted the status of intervening parties in their individual capacity. Their interests in the outcome of this case, therefore, had been a matter of record virtually from the commencement of this litigation. See, Motion to Intervene, reprinted in Brief of Plaintiffs-Appellees at SA1-SA11. These interests include their professional and economic interests in the enforcement of the statutory provisions at issue, as well as their standing to protect the rights of their potential patients: newborn infants who may survive abortion, and women who may be suffer emotional distress if they become aware that they have unwittingly been using abortifacient drugs or devices. There is no question here of a party attempting to convert his

official-capacity status to that of individual-capacity status without proper foundation. The appellants have been parties to this proceeding in their individual capacities for over six years.

The concurring opinion of Justice Marshall in Bender aptly characterizes the difference between the position of Dr. Diamond and Dr. Williams and that of Mr. Youngman. "I do not contest that Mr. Youngman could pursue this dispute on appeal had he intervened in the lawsuit in his capacity as a parent." Slip. op. at 16. In this case, Dr. Diamond and Dr. Williams have long since fulfilled the requirement of securing their status as parties through the filing of a successful motion for intervention. In the words of a district court opinion cited by the appellees in their supplemental brief, "the intervenors

chose to enter the suit in a position equal to that of the State defendants..." Supplemental Brief at 7. Accordingly, the intervenors' right to appeal in this matter is equal to that of any other party, and thus, this Court has jurisdiction over the intervenors' appeal.

Appellees, in their supplemental brief, have also discussed the question of whether the award of attorneys' fees against the appellants provides additional grounds for this Court's jurisdiction. Appellants, who have briefed this issue in their own supplemental brief dated March 18, 1986, desire only to clarify a citation of authority made by appellees.

On page 7 of their supplemental brief, appellees cite an edited portion of a paragraph from the opinion of the

district court on the issue of whether the appellants have conducted this litigation in bad faith. The edited citation fails to include that portion of the paragraph in which the court finds that the behavior of appellants apparently did not meet the standard of "bad faith" prevailing in the Seventh Circuit. The full text of the paragraph is as follows:

> Because the Court finds that the plaintiffs are prevailing parties against all defendants, it need not reach the issue of whether the intervenors litigated in bad faith. The Seventh Circuit has defined bad faith as conduct without "at least a colorable basis in law." Analytica, Inc. v. NPD Research, Inc., 708 F. 2d 1263, 1269 (7th Cir. 1983). Although as this court observed earlier, the intervenors did exhibit "recalcitrance" and precipitated "unneeded expenditure of time" in the case, their behavior does not appear to have reached the Seventh Circuit's definition of bad faith. Charles v. Carey, Slip. op. at p. 6.

Charles v. Daley, Memo. Op., April 22,

1985, at 4-5. (Emphasis supplied) Accordingly, the only basis for an award of attorneys' fees in this case is the finding that, in the district court and the court of appeals, the plaintiffs have prevailed against the appellants. Since a reversal of the lower court opinions will result in a reduction of the awarded amount of fees, this Court has jurisdiction to hear appellants' appeal from these adverse judgments.

CONCLUSION

For the reasons set forth above, and in the appellants opening brief, reply brief and prior supplemental brief, this Court possesses jurisdiction over this

appeal under Article III of the Constitution.

Respectfully submitted,

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DATED: April 4, 1986